10

# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

## No. 163.

OUNO H. RUDOLPH, JOHN A. JOHNSTON, AND CHESTER HARDING, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, PETITIONERS,

vs.

LYNCHBURG INVESTMENT CORPORATION AND HOLMES CENTRAL REALTY CORPORATION.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

PETITION FOR CERTIORARI FILED MAY 8, 1915.
WRIT OF CERTIORARI AND RETURN FILED JULY 3, 1915.

(23,068)

# (23,668)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1914.

# No. 163.

CUNO H. RUDOLPH, JOHN A. JOHNSTON, AND CHESTER HARDING, COMMISSIONERS OF THE DISTRICT OF COLUMBIA, PETITIONERS,

*vs.*

LYNCHBURG INVESTMENT CORPORATION AND HOLMES CENTRAL REALTY CORPORATION.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

INDEX.


| | Original. | Print |
|---|---|---|
| Caption | 1 | 1 |
| Transcript from the supreme court of the District of Columbia. | 1 | 1 |
| Caption | 1 | 1 |
| Petition | 1 | 1 |
| Plat, Exhibit D. C. 1 | 7 | 6 |
| Notice and order of publication | 7 | 7 |
| Proof of publication in Washington Post | 8 | 8 |
| Proof of publication in Washington Law Reporter | 10 | 10 |
| Proof of publication in the Evening Star | 12 | 12 |
| Certificate of publication in the Washington Herald | 13 | 13 |
| Appearances | 15 | 15 |
| Memoranda: Order directing marshal to summon jury; order accepting and directing jury; case submitted to jury | 15 | 15 |
| Verdict of jury | 16 | 15 |
| Schedules Nos. 1 and 2 | 16 | 16 |
| Motion of Lynchburg Investment Corporation to vacate verdict | 29 | 28 |
| Exceptions of Holmes Central Realty Corporation to verdict | 32 | 31 |
| Motion to ratify and confirm verdict of jury | 33 | 32 |
| Order overruling exceptions and objections and confirming verdict; appeal | 33 | 32 |
| Memoranda: Appeal bonds approved and filed | 33 | 32 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 8, 1914.

| | Original. | Print |
|---|---|---|
| Time to file and settle bills of exceptions and transcript of record extended; bill of exceptions submitted | 33 | 32 |
| Order making bill of exceptions part of record | 33 | 32 |
| Bill of exceptions | 34 | 33 |
| Two diagrams | 42 | 41 |
| Memorandum: Time to file transcript of record extended | 42 | 42 |
| Assignment of errors on behalf of Lynchburg Investment Corporation and the Holmes Central Realty Investment Corporation | 42 | 42 |
| Directions to clerk for preparation of transcript of record | 44 | 44 |
| Memorandum: Time to file transcript further extended | 45 | 45 |
| Clerk's certificate | 45 | 45 |
| Minute entry of argument and submission | 47 | 45 |
| Stipulation of facts | 48 | 46 |
| Opinion | 49 | 46 |
| Judgment | 53 | 51 |
| Clerk's certificate | 54 | 52 |
| Writ of certiorari | 55 | 52 |
| Stipulation as to return to writ of certiorari | 58 | 53 |
| Clerk's certificate and return to writ of certiorari | 59 | 53 |

1 In the Court of Appeals of the District of Columbia.

No. 2468.

LYNCHBURG INVESTMENT CORPORATION et al., Appellants,
vs.
CUNO H. RUDOLPH et al.

Supreme Court of the District of Columbia.

District Court, No. 990.

In re THE EXTENSION AND WIDENING OF COLORADO AVENUE AND OF KENNEDY STREET NORTHWEST.

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed, and proceedings had, in the above-entitled cause, to wit:

*Petition.*

Filed November 28, 1911.

In the Supreme Court of the District of Columbia, Holding a District Court.

District Court, No. 990.

In re THE EXTENSION AND WIDENING OF COLORADO AVENUE AND OF KENNEDY STREET NORTHWEST.

The petition of Cuno H. Rudolph, John A. Johnston and William V. Judson, respectfully represents:

1. That they are the Commissioners of the District of Columbia, and as such Commissioners file this petition under the authority of an Act of Congress approved June 30, 1911, entitled "An Act to authorize the extension and widening of Colorado Avenue, Northwest from Longfellow Street to Sixteenth Street, and of Kennedy Street, Northwest through lot numbered eight hundred, square numbered twenty-seven hundred and eighteen," wherein and whereby
2 your petitioners are authorized and directed within six months after the passage of said Act under and in accordance with the provisions of Sections 491*a* to 491*n*; both inclusive, of subchapter 1 of Chapter XV of the Code of Law for the District of Co-

lumbia, to institute proceedings in rem in the Supreme Court of the District of Columbia, to condemn the land that may be necessary for the extension and widening of Colorado Avenue, Northwest, from Longfellow Street to Sixteenth Street with a width of one hundred and twenty feet, according to the plan for the permanent system of highways for the District of Columbia, and of Kennedy Street, Northwest, through lot numbered eight hundred, square twenty-seven hundred and eighteen, with a width of ninety feet; that your petitioners under the authority of said Act and according to the provisions thereof and of said sub-chapter 1 of chapter XV of the Code, file this petition for the purpose of acquiring by condemnation the hereinafter described land for the extension and widening of Colorado Avenue, and of Kennedy Street, as aforesaid, and for the assessments of the benefits resulting from the said extension and widening of Colorado Avenue and Kennedy Street.

2. That a map or plat showing the land to be taken for the said extension and widening of Colorado Avenue and Kennedy Street is hereto annexed as part of this petition, marked "Exhibit D. C., No. 1."

3. That the land necessary for the said extension and widening of Colorado Avenue and Kennedy Street (together with the names and residences of the owners of the fee thereof, as far as the same can be ascertained) is particularly described as follows:

*Descriptions of Land to Be Condemned for the Extension and Widening of Colorado Avenue Northwest from Longfellow Street to 16th Street, and of Kennedy Street Northwest Through Lot No. 800, Square 2718.*

Part of a tract of land taxed as Parcel 86/6:

Beginning for the same at the intersection of the east line of 16th street with the easterly line of Blagden Mill Road, and running thence with the east line of 16th street, south 0 05′ west 74.74 feet; thence with proposed easterly line of Colorado Avenue, 120 feet wide, north 33° 22′ 40″ east 316.83 feet to the easterly line of the Blagden Mill Road; thence with said easterly line, south 42° 34′ west 257.68 feet to the point of beginning, containing 6502.94 square feet.

Assessed in the name of Harriet S. Mathewson.

Part of a tract of land taxed as lot 808, square 2718:

Beginning for the same at the intersection of the east line of 16th street with the westerly line of Blagden Mill Road, and running thence with the east line of 16th street, north 0 05′ east 94.87 feet to the proposed westerly line of Colorado Avenue, 120 feet wide; thence with said proposed line, north 33° 22′ 40″ east 282.46 feet to the northerly line of said lot; thence with said northerly line, south 56° 37′ 20″ east 110.51 feet to the westerly line of Blagden Mill Road; thence with said westerly line south 42° 34′ west 366.40 feet to the point of beginning, containing 27340.16 square feet.

Assessed in the name of Henry W. Houston.

Part of a tract of land taxed as Lot 809, Square 2718:

Beginning for the same at the most southerly corner of said lot, and running thence with the southerly line of said lot, north 56° 37′ 20″ west 110.51 feet to the proposed westerly line of Colorado Avenue, 120 feet wide; thence with said westerly line, north 33° 22′ 40″ east 100 feet to the northerly line of said lot; thence with said northerly line, south 56° 37′ 20″ east 82.97 feet to the westerly line of Piney Branch Road; thence with said westerly line, south 1° 26′ 30″ west 38.27 feet to an angle in said line; thence still with said line, south 17° 01′ east 20.94 feet to the westerly line of the Blagden Mill Road; thence with said westerly line, south 42° 34′ west 54.90 feet to the point of beginning, containing 10738.66 square feet.

Assessed in the name of John H. Holt 903 G St. N. W.

Part of a tract of land taxed as Lot 815, Square 2718:

Beginning for the same at the most southerly corner of said lot, and running thence with the southerly line of said lot, north 56° 37′ 20″ west 82.97 feet to the proposed westerly line of Colorado Avenue, 120 feet wide; thence with said westerly line, north 33° 22′ 40″ east 15 feet to the northerly line of said lot; thence with said northerly line, south 56° 37′ 20″ east 73.61 feet to the westerly line of Piney Branch Road; thence with said westerly line south 1° 26′ 30″ feet west 17.68 feet to the point of beginning containing 1174.35 square feet.

Assessed in the names of Chas. C. Bryan and Walter A. Brown, Trustees, 1307 Fairmont N. W., 624 14th St. N. W.

Part of a tract of land taxed as Lot 810, Square 2718:

Beginning for the same at the most southerly corner of said lot, and running thence with the southerly line of said lot, north 56° 37′ 20″ west 73.61 feet to the proposed westerly line of Colorado Avenue, 120 feet wide; thence with said westerly line, north 33° 22′ 40″ east 150 feet to the northerly line of said lot; thence with said northerly line, south 56° 37′ 20″ east 30.01 feet to the present westerly line of Colorado Avenue; thence with said westerly line the following courses and distances:

South 32° 44′ 30″ west 10.78 feet; south 22° 37′ 30″ west 101.87 feet; south 1° 26′ 30″ west 46.15 feet to the point of beginning, containing 6696.22 square feet.

Assessed in the name of Alonzo O. Bliss, Hotel Driscoll.

4 Part of a tract of land taxed as Lot 818, Square 2718:

Beginning for the same at the most southerly corner of said lot, and running thence with the southerly line of said lot, north 56° 37′ 20″ west 30.01 feet to the proposed westerly line of Colorado Avenue, 120 feet wide; thence with said westerly line, north 33° 22′ 40″ east 50 feet to the northerly line of said lot; thence with said northerly line, south 56° 37′ 20″ east 29.44 feet to the present westerly line of Colorado Avenue; thence with said westerly line, south

32° 44′ 30″ west 50 feet to the point of beginning, containing 1486.25 square feet.

Assessed in the name of Ellis Spear, 1851 Lamont, N. W.

Part of a tract of land taxed as Lot 819, Square 2718:

Beginning for the same at the most southerly corner of said lot, and running thence with the southerly line of said lot, north 56° 37′ 20″ west 29.44 feet to the proposed westerly line of Colorado Avenue, 120 feet wide; thence with said westerly line, north 33° 22′ 40″ east 100 feet to the northerly line of said lot; thence with said northerly line, south 56° 37′ 20″ east 28.29 feet to the present westerly line of Colorado Avenue; thence with said westerly line, south 32° 44′ 30″ west 100.01 feet to the point of beginning, containing 2886.50 square feet.

Assessed in the name of Thomas G. Stewart.

Part of a tract of land taxed as Lot 812, Square 2718:

Beginning for the same at the most southerly corner of said lot, and running thence with the southerly line of said lot, north 56° 37′ 20″ west 28.29 feet to the proposed westerly line of Colorado Avenue, 120 feet wide; thence with said westerly line, north 33° 22′ 40″ east 100 feet to the northerly line of said lot; thence with said northerly line, south 56° 37′ 20″ east 27.15 feet to the present westerly line of Colorado Avenue; thence with said westerly line, south 32° 44′ 30″ west 100.01 feet to the point of beginning, containing 2772 square feet.

Assessed in the name of Fred M. Tryon, 1225 Mass. Ave. S. E.

Part of a tract of land taxed as Lot 813, Square 2718:

Beginning for the same at the most southerly corner of said lot, and running thence with the southerly line of said lot, north 56° 37′ 20″ west 27.15 feet to the proposed westerly line of Colorado Avenue, 120 feet wide; thence with said westerly line, north 33° 22′ 40″ east 100 feet to the northerly line of said lot; thence with said northerly line, south 56° 37′ 20″ east 26 feet to the present westerly line of Colorado Avenue; thence with said westerly line, south 32° 44′ 30″ west 100.01 feet to the point of beginning, containing 2657.50 square feet.

Assessed in the name of Marie May Fisher, 1848 Wyoming Ave. N. W.

5 Part of a tract of land taxed as Lot 814, Square 2718:

Beginning for the same at the most southerly corner of said lot, and running thence with the southerly line of said lot, north 56° 37′ 20″ west 26 feet to the proposed westerly line of Colorado Avenue, 120 feet wide; thence with said westerly line, north 33° 22′ 40″ east 112.22 feet to the northerly line of said lot; thence with said northerly line, south 62° 22′ east 24.79 feet to the present westerly line of Colorado Avenue; thence with said westerly line, south

32° 44′ 30″ west 114.44 feet to the point of beginning, containing 2872.94 square feet.

Assessed in the name of Ernest Wilkinson, Ouray Bldg.

Part of a tract of land taxed as Lot 800, Square 2718:

Beginning for the same at the most northerly corner of said lot, and running thence with the east line of 16th street, south 0 05′ west 59.01 feet to the proposed south line of Kennedy Street, 90 feet wide; thence with said south line, east 112.80 feet to the northerly line of said lot; thence with said northerly line, north 62° 22′ west 125.91 feet to the point of beginning, containing 3328 square feet.

Assessed in the name of John P. Perry, Ezra R. Frost and Helen M. Bostwick, 606 9th St. N. W., 142 R N. E.

Part of a tract of land taxed as Parcel 8613:

Beginning for the same at the northwest corner of said parcel, and running thence with the south line of Longfellow Street, east 77.14 feet to the proposed easterly line of Colorado Avenue, 120 feet wide; thence with said easterly line, south 33° 22′ 30″ west 169.17 feet to the southerly line of said parcel; thence with said southerly line, north 79° 51′ west 66.18 feet to the present easterly line of Colorado Avenue; thence with said easterly line, north 32° 01′ 30″ east 152.88 feet to the point of beginning, containing 10143.50 square feet.

Assessed in the name of Carrie Madison, 13th & Longfellow St. N. W.

4. That the aforesaid Act of Congress provides that the total amount to be found due and awarded as damages plus the cost and expenses of the proceedings, shall be assessed by the jury as benefits, and that said assessments shall be made by the said jury as benefits as contemplated in Section 491*g* of sub-chapter 1 of Chapter XV of the Code hereinbefore referred to, which said Section 491*g* provides:

"That such amount shall be assessed by the jury as benefits, and to the extent of such benefits against the lots, pieces or parcels of land on each side of the street, avenue or highway to be opened, extended, widened or straightened, and against any and all other lots, pieces or parcels of land which the jury may find will be benefited by the opening, extension, widening or straightening; and in determining the amount to be assessed against said lots, pieces or parcels of land the jury shall take into consideration the respective parcels of land the jury shall take into consideration the
6 respective situations, and topographical condition of said lots, pieces or parcels of land, and the benefits and advantages they may severally receive from the opening, extension, widening or straightening of said street, avenue, road or highway."

Wherefore, the premises considered, and in accordance with the further provisions of sub-chapter 1 of Chapter XV of the Code of Law for the District of Columbia, your petitioners pray as follows:

First. That this Honorable Court may cause public notice of not

less than twenty days to be given of the institution of these proceedings by advertisement in three daily newspapers published in the District of Columbia, which notice shall warn and require all persons having any interest in the proceedings to appear in this Court at a day to be named in said notice, and to continue in attendance until the Court shall have made its final order ratifying and confirming the award of damages and the assessments of benefits by the jury; and shall cause a copy of said notice to be served by the United States Marshall for the District of Columbia, or his deputies, upon such owners of the land to be condemned as can be found by the said Marshal or his deputies, within the District of Columbia, and upon the tenants and occupants of the same.

Second. That the said Marshal may be directed to summon a jury of five experienced, judicious, disinterested men, who shall be freeholders in the District of Columbia, not related to any person interested in these proceedings and not in the service or employment of the District of Columbia, or of the United States, to ascertain the damages each owner of the land to be taken may sustain by reason of the said extension and widening of Colorado Avenue and Kennedy Street, and the condemnation of the land necessary for the same, and to assess the benefits resulting therefrom in accordance with the provisions of the aforesaid Act of Congress and of the aforesaid sub-chapter 1 of chapter XV of the Code.

Third. That such other and further orders may be passed and proceedings had herein as are contemplated by the aforesaid Act of Congress, to the end that the aforesaid land may be condemned and secured for the said extension and widening of Colorado Avenue and of Kennedy Street, as aforesaid.

CUNO H. RUDOLPH,
JOHN A. JOHNSTON,
WM. V. JUDSON,
*Commissioners of the District of Columbia.*

DISTRICT OF COLUMBIA, *ss:*

Cuno H. Rudolph, being first duly sworn says:

That he is the President of the Board of Commissioners of the District of Columbia, that he has read the foregoing petition subscribed by the said Commissioners and knows the contents thereof; that the facts therein stated are true to the best of his official knowledge and belief.

CUNO H. RUDOLPH.

7 Subscribed and sworn to before me this 23d day of November, A. D. 1911.

WILLIAM TINDALL,
*Notary Public, D. C.*

E. H. THOMAS,
J. F. SMITH,
*Att'ys.*

(Here follows drawing marked page 7½.)

CHART

TOO

LARGE

FOR

FILMING

*Notice and Order of Publication.*

Filed November 28, 1911.

* * * * * * *

Notice is hereby given that the Commissioners of the District of Columbia, pursuant to the provisions of an Act of Congress approved June 30th, 1911, entitled, "An Act to authorize the extension and widening of Colorado Avenue, Northwest, from Longfellow Street to Sixteenth Street, and of Kennedy Street, Northwest, through lot numbered eight hundred, square numbered twenty-seven hundred and eighteen", have filed a petition in this Court praying the condemnation of the land necessary for the extension and widening of Colorado Avenue, Northwest, with a width of one hundred and twenty feet, and of Kennedy Street, Northwest, with a width of ninety feet, in the District of Columbia, as shown on a map or plat filed with the said petition, as part thereof, and praying also that a jury of five experienced, judicious, disinterested men, who shall be freeholders within the District of Columbia, not related to any person interested in these proceedings and not in the service or employment of the District of Columbia, or of the United States, be summoned by the United States Marshal for the District of Columbia, to assess the damages each owner of the land to be taken may sustain by reason of the extension and widening of the aforesaid street and avenue and the condemnation of the land necessary for the purposes thereof, and to assess as benefits resulting therefrom the entire amount of said damages plus the costs of this proceeding upon the land abutting upon the said avenue and street to be extended and widened, and also upon all other pieces and parcels of land which the jury may find will be benefited by the said extension and widening of said Avenue and Street, as provided for by the aforesaid Act of Congress. It is, by the Court, this 28th day of November, A. D. 1911, Ordered: That all persons having any interest in these proceedings be, and they are hereby, warned and commanded to appear in this Court on or before the 9th day of January A. D., 1912, at ten O'clock, A. M., and continue in attendance until the Court shall have made its final order ratifying and confirming the award
8 of damages and the assessment of benefits of the jury to be empaneled and sworn herein, and it is further Ordered, that a copy of this notice and order be published once in the Washington Law Reporter and on six secular days in the Washington Evening Star, the Washington Herald, and the Washington Post, newspapers published in the said District, commencing at least twenty days before the said 9th day of January A. D. 1912. It is further Ordered, that a copy of this notice and order be served by the United States Marshal or his deputies, upon such owners of the land to be condemned herein as may be found by the said Marshal or his deputies within the District of Columbia, and upon the tenants and occupants of the same before the said 9th day of January A. D. 1912.

By the Court: JOB BARNARD, *Justice.*

*Proof of Publication.*

Filed January 9, 1912.

* * * * * * *

*Affidavit.*

DISTRICT OF COLUMBIA, *To wit:*

Personally appeared before me, a Notary Public in and for the said District, Arthur D. Marks well known to me to be one of the publishers of The Washington Post, a daily newspaper printed and published in the City of Washington and the District aforesaid, and made oath in due form of law that the annexed notice was published in said daily newspaper at the times mentioned in the Certificate opposite hereto.

Witness my hand and official seal this 6 day of Nov. 1911.

[SEAL.] WILLIAM K. NOTTINGHAM,
*Notary Public, D. C.*

Cost of Proof of Publication not paid unless annexed receipt is signed and stamped by cashier of The Washington Post Company.

WASHINGTON, D. C., Nov. 6, 1911.

M— Dist. Com'rs to The Washington Post Company, Dr.

For publishing the annexed Legal Notice in The Washington Post ..... $62.10

Received payment for the Company —— —, 19—.

—— ——.

9 E. H. Thomas and Jas. Francis Smith, Attorneys.

In the Supreme Court of the District of Columbia, Holding a District Court.

District Court, No. 990.

In re EXTENSION AND WIDENING OF COLORADO AVENUE AND KENNEDY STREET NORTHWEST.

Notice is hereby given that the Commissioners of the District of Columbia, pursuant to the provisions of an Act of Congress approved June 30, 1911, entitled "An Act to authorize the extension and widening of Colorado Avenue, Northwest, from Longfellow Street to Sixteenth Street, and of Kennedy Street, Northwest, through lot numbered eight hundred, square numbered twenty-seven hundred and eighteen," have filed a petition in this Court praying the condemnation of the land necessary for the extension and widen-

ing of Colorado Avenue, Northwest, with a width of one hundred and twenty feet, and of Kennedy Street, Northwest, with a width of ninety feet, in the District of Columbia, as shown on a map or plat filed with the said petition, as part thereof, and praying also that a jury of five experienced, judicious, disinterested men, who shall be freeholders within the District of Columbia, not related to any person interested in these proceedings and not in the service or employment of the District of Columbia, or of the United States, be summoned by the United States Marshal for the District of Columbia, to assess the damages each owner of the land to be taken may sustain by reason of the extension and widening of the aforesaid street and avenue and the condemnation of the land necessary for the purposes thereof, and to assess as benefits resulting therefrom the entire amount of said damages plus the costs of this proceeding upon the land abutting upon the said avenue and street to be extended and widened, and also upon all other pieces and parcels of land which the jury may find will be benefited by the said extension and widening of said Avenue and Street, as provided for by the aforesaid Act of Congress. It is, by the Court, this 28th day of November, A. D. 1911, Ordered: That all persons having any interest in these proceedings be, and they are hereby, warned and commanded to appear in this Court on or before the 9th day of January, A. D. 1912, at Ten O'clock, A. M., and continue in attendance until the Court shall have made its final order ratifying and confirming the award of damages and the assessment of benefits of the jury to be empaneled and sworn here, and it is further Ordered, that a copy of this notice and order be published once in the Washington Law Reporter and on six secular days in the Washington Evening Star, the Washington Herald, and The Washington Post, newspapers published in the said District, commencing at least twenty days before the said 9th day of January A. D. 1912. It is further Ordered, that a copy of this notice and order be served by the United States Marshal or his deputies, upon such owners of the land to be condemned herein as may be found by the said Marshal or his deputies within the District of Columbia, and upon the tenants and occupants of the same before the said 9th day of January A. D. 1912.

By the Court:

JOB BARNARD, *Justice.*

A true Copy.
Test:

[SEAL.] J. R. YOUNG, *Clerk,*
By F. E. CUNNINGHAM,
*Ass't Clerk.*

I hereby certify that the foregoing Legal Notice was printed and published in the Washington Post, a daily newspaper upon the following dates: Nov. 29, Dec. 1-2-4-5-6, 1911.

ARTHUR D. MARKS,
*Business Manager.*

* * * * * * *

*Affidavit.*

DISTRICT OF COLUMBIA, *To wit:*

Personally appeared before me, a Notary Public in and for the said District, M. W. Moore, who being duly sworn according to law, on oath says he is the Manager of The Law Reporter Printing Company, publisher of "The Washington Law Reporter" a weekly newspaper printed and published in the District aforesaid, and that the advertisement of which the annexed is a true copy was published in the regular editions of said weekly newspaper 1 times, on the following dates Dec. 1, 1911.

M. W. MOORE.

Sworn to and subscribed before me Dec. 8th, 1911.

[SEAL.] WM. J. NEALE,
*Notary Public, District of Columbia.*

Office of Publication, 518 Fifth Street N. W.

No. 990, Doc. —, 777.

In re THE WIDENING AND EXTENSION OF COLORADO AVE. AND OF KENNEDY STREET.

WASHINGTON, D. C., *Dec.* 8, 1911.

M— District of Coul-bia to The Law Reporter Printing Company, Dr., Publisher of "The Washington Law Reporter."

For Publishing the attached Legal Notice..... $7.68

Received payment for the company —— ——, 191–.

—— ——,
*General Manager.*
Per —— ——.

11 E. H. Thomas and Jas. Francis Smith, Attorneys.

In the Supreme Court of the District of Columbia, Holding a District Court.

District —, No. 990.

In re EXTENSION AND WIDENING OF COLORADO AVENUE AND OF KENNEDY STREET NORTHWEST.

Notice is hereby given that the Commissioners of the District of Columbia, pursuant to the provisions of an act of Congress approved June 30th, 1911, entitled, "An Act to authorize the extension and widening of Colorado Avenue, Northwest, from Longfellow Street to Sixteenth Street, and of Kennedy Street, Northwest, through lot numbered eight hundred, square numbered twenty-seven hundred

and eighteen," have filed a petition in this Court praying the condemnation of the land necessary for the extension and widening of Colorado Avenue, Northwest, with a width of one hundred and twenty feet, and of Kennedy Street, Northwest, with a width of ninety feet, in the District of Columbia, as shown on a map or plat filed with the said petition, as part thereof, and praying also that a jury of five experienced, judicious, disinterested men, who shall be freeholders within the District of Columbia, not related to any person interested in these proceedings and not in the service or employment of the District of Columbia, or of the United States, be summoned by the United States Marshal for the District of Columbia to assess the damages each owner of the land to be taken may sustain by reason of the extension and widening of the aforesaid *and* street and avenue and the condemnation of the land necessary for the purposes thereof, and to assess as benefits resulting therefrom the entire amount of said damages plus the costs of this proceeding upon the land abutting upon the said Avenue and Street to be extended and widened, and also upon all other pieces and parcels of land which the jury may find will be benefited by the said extension and widening of said Avenue and Street, as provided for by the aforesaid Act of Congress. It is, by the Court, this 28th day of November, A. D. 1911, Ordered: That all persons having any interest in these proceedings be, and they are hereby, warned and commanded to appear in this Court on or before the 9th day of January A. D. 1912, at ten o'clock, A. M., and continue in attendance until the Court shall have made its final order ratifying and confirming the award of damages and the assessment of benefits of the jury to be empaneled and sworn herein, and it is further Ordered, that a copy of this notice and order be published once in the Washington Law Reporter and on six secular days in the Washington Evening Star, the Washington Herald, and the Washington Post, newspapers published in the said District, commencing at least twenty days before the said 9th day of January A. D. 1912. It is further Ordered, that a copy of this notice and order be served by the United States Marshal or his deputies upon such owners of the land to be condemned
12 herein as may be found by the said Marshal or his deputies within the District of Columbia, and upon the tenants and occupants of the same before the said 9th day of January A. D. 1912.

By the Court:

JOB BARNARD, *Justice.*

A true Copy.
Test:

[SEAL.] J. R. YOUNG, *Clerk.*
By F. E. CUNNINGHAM,
*Ass't Clerk.*

*Proof of Publication.*

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me Jay B. Smith, a Notary Public in and for the District aforesaid, Fleming Newbold, who being duly sworn according to law, on oath says that he is the Agent and Business Manager of The Evening Star, a daily newspaper Published in this City of Washington, District of Columbia, and that the advertisement, of which the annexed is a true copy, was published in said newspaper six times on the following dates: Nov'r 29, Dec. 1-2-4-5 & 6 1911, at a cost of Sixty four and 80/100 ($64.80) Dollars.

FLEMING NEWBOLD.

Sworn to and subscribed before me Dec'r 8th, 1911.

[SEAL.] JAY B. SMITH,
*Notary Public.*

E. H. Thomas and Jas. Francis Smith, Attorneys.

In the Supreme Court of the District of Columbia, Holding a District Court.

District Court, No. 990.

In re EXTENSION AND WIDENING OF COLORADO AVENUE AND OF KENNEDY STREET NORTHWEST.

Notice is hereby given that the Commissioners of the District of Columbia, pursuant to the provisions of an Act of Congress approved June 30th, 1911, entitled "An Act to authorize the extension and widening of Colorado Avenue, Northwest, from Longfellow Street to Sixteenth Street, and of Kennedy Street, Northwest, through lot numbered eight hundred, square numbered twenty-seven hundred and eighteen," have filed a petition in this Court praying the condemnation of the land necessary for the extension and widening of Colorado Avenue, Northwest, with a width of one hundred and twenty feet, and of Kennedy Street, Northwest, with a width
13 of ninety feet, in the District of Columbia, as shown on a map or plat filed with the said petition, as part thereof, and praying also that a jury of five experienced, judicious, disinterested men, who shall be freeholders within the District of Columbia, not related to any person interested in these proceedings and not in the service or employment of the District of Columbia, or of the United States, be summoned by the United States Marshal for the District of Columbia, to assess the damages each owner of the land to be taken may sustain by reason of the extension and widening of the aforesaid street and avenue and the condemnation of the land necessary for the purposes thereof, and to assess as benefits resulting therefrom the entire amount of said damages plus the costs of this pro-

ceeding upon the land abutting upon the said avenue and street to be extended and widened, and also upon all other pieces and parcels of land which the jury may find will be benefited by the said extension and widening of said Avenue and Street, as provided for by the aforesaid Act of Congress. It is, by the Court, this 28th day of November, A. D. 1911, Ordered: That all persons having any interest in these proceedings be, and they are hereby, warned and commanded to appear in this Court on or before the 9th day of January, A. D. 1912, at ten O'clock, A. M., and continue in attendance until the Court shall have made its final order ratifying and confirming the award of damages and the assessment of benefits of the jury to be empaneled and sworn herein, and it is further Ordered, that a copy of this notice and order be published once in the Washington Law Reporter and on six secular days in the Washington Evening Star, the Washington Herald, and the Washington Post, newspapers published in the said District, commencing at least twenty days before the said 9th day of January A. D. 1912. It is further Ordered, that a copy of this notice and order by the United States Marshal or his deputies, — upon such owners of the land to be condemned herein as may be found by the said Marshal or his deputies within the District of Columbia, and upon the tenants and occupants of the same before the said 9th day of January A. D. 1912.

By the Court:

JOB BARNARD, *Justice.*

A true copy.
Test:

[SEAL.] J. R. YOUNG, *Clerk,*
By F. E. CUNNINGHAM,
*Ass't Clerk.*

*Certificate of Publication.*

CITY AND COUNTY OF WASHINGTON,
*District of Columbia, ss:*

On this 9th day of January, A. D. one thousand nine hundred and twelve personally appeared before me Paul F. Cain, a
14 Notary Public in and for the City and County aforesaid J. W. Hunter who being duly sworn according to law, declares that he is the business Manager of The Washington Herald, a daily newspaper Published in this City and County of Washington, District of Columbia, and that the advertisement, of which the annexed is a true copy, was published on the following dates: Dec. 2, 4, 5, 6, 7, 8, 1911, at a cost of Forty-eight & 60/100 Dollars.

J. W. HUNTER,
*Business Manager The Washington Herald Co.*

Sworn and subscribed to before me this 9th day of January, A. D. one thousand nine hundred and Twelve.

[SEAL.] PAUL F. CAIN,
*Notary Public.*

E. H. Thomas and Jas. Francis Smith, Attorneys.

In the Supreme Court of the District of Columbia, Holding a District Court.

District Court, No. 990.

In re Extension and Widening of Colorado Avenue and of Kennedy Street Northwest.

Notice is hereby given that the Commissioners of the District of Columbia, pursuant to the provisions of an Act of Congress approved June 30th, 1911, entitled "An Act to authorize the extension and widening of Colorado Avenue, Northwest, from Longfellow Street to Sixteenth Street, and of Kennedy Street, Northwest, through lot numbered eight hundred, square numbered twenty-seven hundred and eighteen," have filed a petition in this Court praying the condemnation of the land necessary for the extension and widening of Colorado Avenue, Northwest, with a width of one hundred and twenty feet, and of Kennedy Street, Northwest, with a width of ninety feet, in the District of Columbia, as shown on a map or plat filed with the said petition, as part thereof, and praying also that a jury of five experienced, judicious, disinterested men, who shall be freeholders within the District of Columbia, not related to any person interested in these proceedings and not in the service or employment of the District of Columbia, or of the United States, be summoned by the United States Marshal for the District of Columbia, to assess the damages each owner of the land to be taken may sustain by reason of the extension and widening of the aforesaid street and avenue and the condemnation of the land necessary for the purposes thereof, and to assess as benefits resulting therefrom the entire amount of said damages plus the costs of this proceeding upon the land abutting upon the said avenue and street to be extended and widened, and also upon all other pieces and parcels of land which the jury may find will be benefited by the said extension and widening of said Avenue and Street, as provided for by the afore-

15 said Act of Congress. It is, by the Court, this 28th day of November, A. D. 1911, Ordered: That all persons having any interest in these proceedings be, and they are hereby, warned and commanded to appear in this Court on or before the 9th day of January A. D., 1912, at ten O'clock, A. M., and continue in attendance until the Court shall have made its final order ratifying and confirming the award of damages and the assessment of benefits of the jury to be empaneled and sworn herein, and it is further Ordered, that a copy of this notice and order be published once in the Washington Law Reporter and on six secular days in the Washington Evening Star, the Washington Herald, and the Washington Post, newspapers published in the said District, commencing at least twenty days before the said 9th day of January A. D. 1912. It is further Ordered, that a copy of this notice and order be served by the United States Marshal or his deputies, upon such owners of the

land to be condemned herein as may be found by the said Marshal or his deputies within the District of Columbia, and upon the tenants and occupants of the same before the said 9th day of January A. D. 1912.

By the Court:

JOB BARNARD, *Justice.*

A true copy.
Test:
[SEAL.] J. R. YOUNG, *Clerk,*
By F. E. CUNNINGHAM,
*Ass't Clerk.*

*Appearances.*

December 20, 1911.—Appearance of A. Leftwich Sinclair for John H. Holt, filed.

January 8, 1912.—Appearance of Eugene A. Jones for Alonzo O. Bliss, filed.

January 9, 1912.—Appearance of S. Herbert Giesy for Ernest Wilkinson, filed.

January 19, 1912.—Appearance of S. Herbert Giesy for Marie May Fisher, filed.

February 23, 1912.—Appearance of William W. Mathewson for Harriet S. Mathewson, filed.

April 11, 1912.—Appearance of James B. Green for John P. Perry, filed.

*Memoranda.*

January 9, 1912.—Order directing Marshal to summon Jury, filed.

January 26, 1912.—Order accepting and directing Jury, filed.

March 8, 1912.—Case submitted to Jury.

16 *Verdict of Jury.*

Filed April 4, 1912.

* * * * * * *

We, the jury in the above entitled cause, hereby find the following verdict and award of damages for and in respect of the land to be condemned and taken for the extension and widening of Colorado Avenue, Northwest, from Longfellow Street to Sixteenth Street, and of Kennedy Street, Northwest, through lot numbered eight hundred, square numbered twenty-seven hundred and eighteen, in the District of Columbia, as shown on the map or plat filed with the petition in this cause, amounting to the sum of thirty-four thousand, one hundred thirty-nine dollars and thirty-seven cents ($34,139.37), as set forth in Schedule No. 1 hereto annexed as part hereof.

And we, the jury aforesaid, hereby find the expenses of these proceedings to amount to the sum of five hundred, thirty-six dollars and eighteen cents, ($536.18).

And we, the jury aforesaid, hereby find the amount of benefits according by reason of the extension and widening of Colorado Avenue, Northwest, from Longfellow Street to Sixteenth Street, and of Kennedy Street, Northwest, through lot numbered eight hundred, square numbered twenty-seven hundred and eighteen, in the District of Columbia, to be the sum of thirty-four thousand, six hundred seventy-five dollars and fifty-five cents ($34,675.55).

And we, the jury aforesaid, find that the lots, pieces or parcels of land which will be benefited by the aforesaid extension and widening of Colorado Avenue, are the lots or parts of lots, pieces or parcels of land, mentioned and described in Schedule No. 2, hereto annexed as part hereof: and we hereby find that the several lots, pieces or parcels of land or parts of lots mentioned in Schedule No. 2, will be benefited to the extent of the respective amounts mentioned and set forth in said Schedule No. 2, and we hereby assess against the said lots, or parts of lots, pieces or parcels of land, respectively, as and for benefits, as aforesaid, the several amounts specified, and set forth in said Schedule No. 2.

Witness our hands and seals this 4th day of April A. D. 1912.

WILLIAM T. GALLEHER. [SEAL.]
APPLETON P. CLARK. [SEAL.]
SAMUEL M. DARRAGH. [SEAL.]
JOHN MITCHELL. [SEAL.]
J. H. SMALL, JR. [SEAL.]

SCHEDULE No. 1.

*Damages.*

Parcels:

Part of a tract of land taxed as Parcel 86/6:

Beginning for the same at the intersection of the east line of 16th street with the easterly line of Blagden Mill Road, and run-
17 ning thence with the east line of 16th Street, south 0° 05′ west 74.74 feet; thence with proposed easterly line of Colorado Avenue, 120 feet wide, north 33° 22′ 40″ east 316.83 feet to the easterly line of the Blagden Mill Road; thence with said easterly line, south 42° 34′ west 257.68 feet to the point of beginning, containing 6502.94 square feet.

Assessed in the name of Harriet S. Mathewson.

Amount awarded as damages..... $4155.35

Square 2718:

Part of a tract of land taxed as Lot 808, Square 2718:

Beginning for the same at the intersection of the east line of 16th Street with the westerly line of Blagden Mill Road, and running thence with the east line of 16th Street, north 0° 05′ east 94.87 feet to the proposed westerly line of Colorado Avenue, 120 feet wide; thence with said proposed line, north 33° 22′ 40″ east 282.46 feet

to the northerly line of said lot; thence with said northerly line, south 56° 37′ 20″ east 110.51 feet to the westerly line of Blagden Mill Road; thence with said westerly line, south 42° 34′ west 366.40 feet to the point of beginning, containing 27340.16 square feet.

Assessed in the name of Henry W. Houston.

Amount awarded as damages..... $12872.00

Part of a tract of land taxed as Lot 809, Square 2718:

Beginning for the same at the most southerly corner of said lot and running thence with the southerly line of said lot, north 56° 37′ 20″ west 110.51 feet to the proposed westerly line of Colorado Avenue, 120 feet wide; thence with said westerly line, north 33° 22′ 40″ east 100 feet to the northerly line of said lot; thence with said northerly line, south 56° 37′ 20″ east 82.97 feet to the westerly line of Piney Branch Road; thence with said westerly line, south 1° 26′ 30″ west 38.27 feet to an angle in said line; thence still with said line, south 17° 01′ east 20.94 feet to the westerly line of Blagden Mill Road; thence with said westerly line, south 42° 34′ west 54.90 feet to the point of beginning, containing 10738.66 square feet.

Assessed in the name of John H. Holt.

Amount awarded as damages..... $4295.54

Part of a tract of land taxed as Lot 815, Square 2718:

Beginning for the same at the most southerly corner of said lot, and running thence with the southerly line of said lot, north 56° 37′ 20″ west 82.97 feet to the proposed westerly line of Colorado Avenue, 120 feet wide; thence with said westerly line, north 33° 22′ 40″ east 15 feet to the northerly line of said lot; thence with said northerly line south 56° 37′ 20″ east 73.61 feet to the westerly line of Piney Branch Road; thence with said west-
18 erly line, south 1° 26′ 30″ west 17.68 feet to the point of beginning, containing 1174.35 square feet.

Assessed in the names of Chas. C. Bryan & Walter A. Brown, Trs.

Amount awarded as damages..... $469.60

Part of a tract of land taxed as Lot 810, Square 2718:

Beginning for the same at the most southerly corner of said lot, and running thence with the southerly line of said lot, north 56° 37′ 20″ west 73.61 feet to the proposed westerly line of Colorado Avenue, 120 feet wide; thence with said westerly line, north 33° 22′ 40″ east 150 feet to the northerly line of said lot; thence with said northerly line, south 56° 37′ 20″ east 30.01 feet to the present westerly line of Colorado Avenue; thence with said westerly line the following courses and distances:

South 32° 44′ 30″ west 10.78 feet;
South 22° 37′ 30″ west 101.87 feet;
South 1° 26′ 30″ west 46.15 feet to the

point of beginning, containing 6606.22 square feet.

Assessed in the names of Arthur L. Bliss, Howard Van Law and E. A. Jones, Trustees.

Amount awarded as damages..... $2678.49

Part of a tract of land taxed as Lot 818, Square 2718:

Beginning for the same at the most southerly corner of said lot, and running thence with the southerly line of said lot, north 56° 37′ 20″ west 30.01 feet to the proposed westerly line of Colorado Avenue, 120 feet wide; thence with said westerly line, north 33° 22′ 40″ east 50 feet to the northerly line of said lot; thence with said northerly line, south 56° 37′ 20″ east 29.44 feet to the present westerly line of Colorado Avenue; thence with said westerly line, south 32° 44′ 30″ west 50 feet to the point of beginning, containing 1486.25 square feet.

Assessed in the name of Ellis Spear.

Amount awarded as damages..... $445.86

Part of a tract of land taxed as Lot 819, Square 2718:

Beginning for the same at the most southerly corner of said lot, and running thence with the southerly line of said lot, north 56° 37′ 20″ west 29.44 feet to the proposed westerly line of Colorado Avenue, 120 feet wide; thence with said westerly line, north 33° 22′ 40″ east 100 feet to the northerly line of said lot; thence with said northerly line, south 56° 37′ 20″ east 28.29 feet to the present westerly line of Colorado Avenue; thence with said westerly line, south 32° 44′ 30″ west 100.01 feet to the point of beginning, containing 2886.50 square feet.

Assessed in the name of Thomas G. Stewart.

Amount awarded as damages..... $865.95

19 Part of a tract of land taxed as Lot 812, Square 2718:

Beginning for the same at the most southerly corner of said lot, and running thence with the southerly line of said lot, north 56° 37′ 20″ west 28.29 feet to the proposed westerly line of Colorado Avenue, 120 feet wide; thence with said westerly line, north 33° 22′ 40″ east 100 feet to the northerly line of said lot; thence with said northerly line, south 56° 37′ 20″ east 27.15 feet to the present westerly line of Colorado Avenue; thence with said westerly line, south 32° 44′ 30″ west 100.01 feet to the point of beginning, containing 2772 square feet.

Assessed in the name of Fred M. Tryon.

Amount awarded as damages..... $831.60

Part of a tract of land taxed as Lot 813, Square 2718:

Beginning for the same at the most southerly corner of said lot, and running thence with the southerly line of said lot, north 56° 37′ 20″ west 27.15 feet to the proposed westerly line of Colorado Avenue, 120 feet wide; thence with said westerly line, north 33° 22′ 40″ east 100 feet to the northerly line of said lot; thence with said northerly line, south 56° 37′ 20″ east 26 feet to the present westerly line of Colorado Avenue; thence with said westerly line, south 32° 44′ 30″ west 100.01 feet to the point of beginning, containing 2657.50 square feet.

Assessed in the name of Marie May Fisher.

Amount awarded as damages..... $791.25

Part of a tract of land taxed as Lot 814, Square 2718:

Beginning for the same at the most southerly corner of said lot, and running thence with the southerly line of said lot, north 56° 37′ 20″ west 26 feet to the proposed westerly line of Colorado Avenue, 120 feet wide; thence with said westerly line, north 33° 22′ 40″ east 112.22 feet to the northerly line of said lot; thence with said northerly line, south 62° 22′ east 24.79 feet to the present westerly line of Colorado Avenue; thence with said westerly line, south 32° 44′ 30″ west 114.44 feet to the point of beginning, containing 2872.94 square feet.

Assessed in the name of Ernest Wilkinson.

Amount awarded as damages..... $861.88

Part of a tract of land taxed as Lot 800, Square 2718:

Beginning for the same at the most northerly corner of said lot, and running thence with the east line of 16th Street, south 0° 05′ west 59.01 feet to the proposed south line of Kennedy Street, 90 feet wide; thence with said south line, east 112.80 feet to the northerly line of said lot; thence with said northerly line, north 62° 22′ west 125.91 feet to the point of beginning, containing 3328 square feet.

Assessed in the name of John P. Perry.

Amount awarded as damages..... $2828.80

Parcels:

Part of a tract of land taxed as Parcel 86/13:

Beginning for the same at the northwest corner of said parcel, and running thence with the south line of Longfellow Street, east 77.14 feet to the proposed easterly line of Colorado Avenue, 120 feet wide; thence with said easterly line, south 33° 22′ 30″ west 169.17 feet to the southerly line of said parcel; thence with said southerly line, north 79° 51′ west 66.18 feet to the present easterly line of Colorado Avenue; thence with said easterly line, north 32° 01′ 30″

east 152.88 feet to the point of beginning, containing 10143.50 square feet.

Assessed in the name of Samuel W. Woodward.

| | |
|---|---|
| Amount awarded as damages | $3043.05 |
| **Costs:** | |
| Court | $311.18 |
| Jury | 225.00 |
| Total | $34675.55 |

SCHEDULE No. 2.

***Benefits.***

| | | | Amount assessed as benefits. |
|---|---|---|---|
| **Square 2804:** | | | |
| All of Lot | 35. | Assessed in the name of Lynchburg Investment Corporation | $85.00 |
| " " " | 34. | " " " " " do. do. | 85.00 |
| " " " | 33. | " " " " " do. do. | 80.10 |
| " " " | 32. | " " " " " do. do. | 80.10 |
| " " " | 31. | " " " " " do. do. | 80.10 |
| **Square 2715:** | | | |
| All of Lot | 8. | Assessed in the name of Edward R. Lake | 485.10 |
| " " " | 9. | " " " " " Nellie T. Hoss | 273.00 |
| " " " | 10. | " " " " " do. do. | 195.20 |
| " " " | 11. | " " " " " Lynchburg Investment Corporation | 141.60 |
| " " " | 12. | " " " " " do. do. | 141.60 |
| " " " | 13. | " " " " " do. do. | 141.60 |
| " " " | 14. | " " " " " do. do. | 141.60 |
| " " " | 15. | " " " " " Harvey A. Benner | 141.60 |
| " " " | 16. | " " " " " Lynchburg Investment Corporation | 80.10 |
| " " " | 17. | " " " " " do. do. | 80.10 |
| " " " | 18. | " " " " " do. do. | 80.10 |
| " " " | 19. | " " " " " do. do. | 80.10 |

22 Square 2716:

| | | | | |
|---|---|---|---|---|
| All of Lot | 4. | Assessed in the names of | John and Mary Jane Dolph | 485.25 |
| " " " | 5. | " " " " " | John and Mary Jane Dolph | 277.00 |
| " " " | 6. | " " " " " | Elizabeth Major Emory | 388.25 |
| All of Lot | 7. | Assessed in the names of | Ellen I. and Charles S. Alden | 374.00 |
| " " " | 8. | " " " " " | Adrienne K. and Charles R. Wentz | 341.20 |
| " " " | 3. | " " " " " | Fannie D. Borden | 154.00 |
| " " " | 2. | " " " " " | Lynchburg Investment Corporation | 182.25 |
| " " " | 1. | " " " " " | Nellie E. Cain | 157.70 |
| " " " | 15. | " " " " " | Nellie P. Helphenstine | 97.10 |
| " " " | 14. | " " " " " | Lynchburg Investment Corporation | 84.90 |
| " " " | 13. | " " " " " | Lucille C. Parker | 84.90 |
| " " " | 12. | " " " " " | James B. Baugh | 84.90 |
| " " " | 11. | " " " " " | Lynchburg Investment Corporation | 84.90 |
| " " " | 10. | " " " " " | do. do. | 97.10 |
| " " " | 9. | " " " " " | do. do. | 94.60 |

Parcels:

All of Par. 86/14. Assessed in the name of W. F. Wilson ..... $319.50

Part of Par. 86/6. Being all of said Parcel 86/6 not condemned by this proceeding. Assessed in the name of Harriet S. Mathewson ..... 6600.00

23 Square 2718:

Part of Lot 808. Being all of said Lot 808 not condemned by this proceeding. Assessed in the name of Henry W. Houston ..... 1634.40

Part of Lot 809. Being all of said Lot 809 not condemned by this proceeding. Assessed in the name of John H. Holt ..... 1597.00

Part of Lot 810. Being all of said Lot 810 not condemned by this proceeding. Assessed in the names of Arthur L. Bliss, Howard R. Van Law and E. A. Jones, Trustees ..... 2427.00

Part of Lot 818. Being all of said Lot 1818 not condemned by this proceeding. Assessed in the name of Ellis Spear..... 606.75

Part of Lot 819. Being all of said Lot 819 not condemned by this proceeding. Assessed in the name of Thomas G. Stewart..... 1213.50

Part of Lot 812. Being all of said Lot 812 not condemned by this proceeding. Assessed in the name of Fred M. Tryon..... 1213.50

Part of Lot 813. Being all of said Lot 813 not condemned by this proceeding. Assessed in the name of Marie May Fisher..... 1213.50

Part of Lot 814. Being all of said Lot 814 not condemned by this proceeding. Assessed in the name of Ernest Wilkinson..... 1360.00

Part of Lot 800. Being all of said Lot 800 not condemned by this proceeding. Assessed in the name of John P. Perry..... 571.00

---

Parcels:

Part of Par. 86/13. Being all of said Parcel 86/13 not condemned by this proceeding. Assessed in the name of Samuel W. Woodward..... 3043.05

---

24 Square 2720:

| | | | | |
|---|---|---|---|---|
| All of Lot | 7. | Assessed in the name of | Harmon S. Palmer, Tr..... | 60.60 |
| " " " | 8. | " " " " " | do. do. ..... | 60.60 |
| " " " | 9. | " " " " " | George W. and Katherine L. Kernodle..... | 60.60 |
| All of Lot | 10. | Assessed in the name of | George W. and Katherine L. Kernodle..... | 60.60 |
| " " " | 11. | " " " " " | do. do. ..... | 60.60 |
| " " " | 12. | " " " " " | do. do. ..... | 60.60 |
| " " " | 813. | " " " " " | do. do. ..... | 50.90 |



THIS PAGE BOUND

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| " | " | " | 814. | " | " | " | " | " | Holmes Central Realty Corporation | 9.70 |
| " | " | " | 14. | " | " | " | " | " | do. do. | 60.60 |
| " | " | " | 15. | " | " | " | " | " | do. do. | 60.60 |
| " | " | " | 16. | " | " | " | " | " | do. do. | 60.30 |
| " | " | " | 810. | " | " | " | " | " | do. do. | 2.45 |
| " | " | " | 809. | " | " | " | " | " | Mary C. Heid | 57.30 |
| " | " | " | 805. | " | " | " | " | " | do. do. | 51.00 |
| " | " | " | 804. | " | " | " | " | " | George P. Meyer | 97.20 |
| " | " | " | 49. | " | " | " | " | " | Margaret B. Lakeman | 143.20 |
| " | " | " | 800. | " | " | " | " | " | George Briggs Colbeck | 10.85 |
| " | " | " | 23. | " | " | " | " | " | do. do. | 86.30 |
| " | " | " | 24. | " | " | " | " | " | Holmes Central Realty Corporation | 60.70 |
| " | " | " | 6. | " | " | " | " | " | do. do. | 101.15 |
| " | " | " | 48. | " | " | " | " | " | do. do. | 80.90 |
| " | " | " | 47. | " | " | " | " | " | do. do. | 60.70 |
| " | " | " | 46. | " | " | " | " | " | do. do. | 60.70 |
| " | " | " | 45. | " | " | " | " | " | do. do. | 94.70 |

25 Square 2803:

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| All | of | Lot | 31. | Assessed | in | the | name | of | Lynchburg Investment Corporation | 94.70 |
| " | " | " | 32. | " | " | " | " | " | do. do. | 97.25 |
| " | " | " | 33. | " | " | " | " | " | do. do. | 84.90 |
| " | " | " | 34. | " | " | " | " | " | do. do. | 84.90 |
| " | " | " | 35. | " | " | " | " | " | do. do. | 84.90 |
| All | of | Lot | 36. | Assessed | in | the | name | of | Lynchburg Investment Corporation | 84.90 |
| " | " | " | 37. | " | " | " | " | " | do. do. | 97.25 |
| " | " | " | 38. | " | " | " | " | " | do. do. | 94.70 |

THIS PAG

Square 2802:

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| All | of | Lot | 29. | Assessed | in | the | name | of | Lynchburg Investment Corporation | 94.70 |
| " | " | " | 30. | " | " | " | " | " | do. do. | 97.25 |
| " | " | " | 31. | " | " | " | " | " | do. do. | 84.90 |
| " | " | " | 32. | " | " | " | " | " | do. do. | 113.30 |
| " | " | " | 33. | " | " | " | " | " | do. do. | 113.30 |
| " | " | " | 34. | " | " | " | " | " | do. do. | 141.60 |
| " | " | " | 35. | " | " | " | " | " | do. do. | 161.80 |
| " | " | " | 36. | " | " | " | " | " | do. do. | 141.60 |

26 Square 2719:

| | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|
| All | of | Lot | 1. | Assessed | in | the | name | of | Holmes Central Realty Corporation | 202.25 |
| " | " | " | 11. | " | " | " | " | " | do. do. | 202.25 |
| " | " | " | 10. | " | " | " | " | " | do. do. | 202.25 |
| " | " | " | 9. | " | " | " | " | " | do. do. | 202.25 |
| " | " | " | 8. | " | " | " | " | " | do. do. | 202.25 |
| " | " | " | 7. | " | " | " | " | " | do. do. | 202.25 |
| " | " | " | 5. | " | " | " | " | " | do. do. | 202.25 |
| " | " | " | 6. | " | " | " | " | " | do. do. | 202.25 |
| " | " | " | 3. | " | " | " | " | " | do. do. | 202.25 |
| " | " | " | 4. | " | " | " | " | " | do. do. | 202.25 |
| " | " | " | 2. | " | " | " | " | " | do. do. | 600.00 |

Square 2800:

| | | | | |
|---|---|---|---|---|
| All of Lot | 1. | Assessed in the names of | Lewis E. Breuninger and Charles F. Jenkins | 111.70 |
| " " " | 2. | " " " " " | Lewis E. Breuninger and Charles F. Jenkins | 50.35 |
| " " " | 3. | " " " " " | Kate E. Small | 59.75 |
| " " " | 4. | " " " " " | Horace M. Fulton | 70.40 |
| " " " | 5. | " " " " " | Robert B. Holmes | 78.85 |

27 Square 2801:

| | | | | |
|---|---|---|---|---|
| All of Lot | 15. | Assessed in the name of | Lynchburg Investment Corporation | 85.00 |
| " " " | 16. | " " " " " | James A. and Elizabeth Callan | 96.90 |
| " " " | 17. | " " " " " | Lynchburg Investment Corporation | 40.05 |
| " " " | 18. | " " " " " | do. do. | 48.55 |
| " " " | 19. | " " " " " | do. do. | 54.60 |

Square 2799:

| | | | | |
|---|---|---|---|---|
| All of Lot | 1. | Assessed in the name of | William C. Dandt | 72.85 |
| " " " | 2. | " " " " " | Holmes Central Realty Corporation, Inc | 48.55 |
| " " " | 15. | " " " " " | do. do. | 40.45 |
| " " " | 14. | " " " " " | do. do. | 40.45 |
| " " " | 13. | " " " " " | do. do. | 40.45 |
| " " " | 12. | " " " " " | do. do. | 40.45 |
| " " " | 11. | " " " " " | do. do. | 40.45 |

Parcels:

All of Par. 87/76. Assessed in the name of Archibald White ..... 121.35

28 Square 2798:

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| All | of | Lot | 16. | Assessed | in | the | name of | Anna E. White ..... 40.45 |
| " | " | " | 17. | " | " | " | " | Ida M. White ..... 32.35 |
| " | " | " | 18. | " | " | " | " | Sadie L. Donnelly ..... 32.35 |
| " | " | " | 19. | " | " | " | " | do. do. ..... 32.35 |
| " | " | " | 20. | " | " | " | " | Ida M. White ..... 32.35 |
| " | " | " | 21. | " | " | " | " | do. do. ..... 32.35 |
| " | " | " | 22. | " | " | " | " | George B. Heinecke ..... 32.35 |
| " | " | " | 23. | " | " | " | " | do. do. ..... 32.35 |
| " | " | " | 24. | " | " | " | " | Wilmer G. Platt ..... 32.35 |
| " | " | " | 25. | " | " | " | " | do. do. ..... 32.35 |
| " | " | " | 57. | " | " | " | " | George R. Linkins and Heber L. Thornton, Trs ..... 64.70 |
| " | " | " | 28. | " | " | " | " | Carrie Madison ..... 32.35 |
| " | " | " | 29. | " | " | " | " | do. do. ..... 32.35 |
| " | " | " | 30. | " | " | " | " | Malcolm A. Coles ..... 32.35 |
| " | " | " | 31. | " | " | " | " | do. do. ..... 32.35 |
| " | " | " | 32. | " | " | " | " | Fannie A. Somerville ..... 21.85 |

Total ..... $34675.55

W. A. W.

29 *Motion to Vacate Verdict.*

Filed April 24, 1912.

* * * * * * *

Now comes the Lynchburg Investment Corporation, a body corporate of the State of Virginia, appearing specially for the purpose of this motion and for none other, and, respectfully showing to the court that it was not made a party to the petition filed herein, that said petition contained no prayer for process against it, and that it had no notice of the pendency of this proceeding either actual or constructive, unless said notice is to be implied from the fact of publication, moves the court to vacate the verdict of the jury filed herein in so far as it is concerned for the following reasons:

1. Notice of publication passed heretofore, to wit, the 28th day of November, A. D. 1911, was defective and insufficient to give the court any jurisdiction over the Lynchburg Investment Corporation or its real estate because it did not give notice that an assessment would be made of benefits which had actually been sustained, but only the benefits which "the jury might find will be" sustained "by the said extension and widening."

2. Because the petition in this cause does not seek the assessment of benefits which are actually sustained by the property, but, instead, an assessment of the benefits resulting from the proposed extension and widening.

3. Because public notice of not less than twenty days was not given of the institution of this proceeding by advertisment in three daily newspapers published in the District of Columbia, as provided by Section 491-*c* of the Code and consequently the court never acquired jurisdiction to assess benefits against the said Lynchburg Investment Corporation or any of the land owned by it.

4. Because the order of publication passed herein on the 28th day of November, A. D. 1911, did not conform to the requirements of the said Section 491-*c*, but, instead, warned and commanded the parties to appear on January 9th, 1912, and required that a copy of that order "be published once in the Washington Law Reporter and on six secular days in the Washington Evening Star, the Washington Herald, and the Washington Post, commencing at least 20 days before the said 9th day of January, A. D. 1912", and the said order was only published in each of the said papers six times, which was not "public notice of not less than twenty days."

5. Because, though the order of publication passed on November 28th, A. D. 1911, required that it be published in the three newspapers therein mentioned on six secular days, it was only published in the Evening Star on five secular days, one of the six publications being had on Saturday, December 2nd, in the afternoon of that day, which was a legal holiday and therefore not a secular day under the order.

30 6. Because the said Lynchburg Investment Corporation was nowhere named in the petition in this cause or in the

prayers annexed thereto, was not served with process, and had no notice of the pendency of this proceeding until after the conclusion of the hearing.

7. Because notice by publication did not constitute due process of law against the Lynchburg Iuvestment Corporation, because of the insufficiency, in the several respects above noted, of the publication actually had, and also because of the unjust discrimination made in the statute between proceedings against the owners of land to be condemned and the owners of land to be assessed for benefits, in that Section 491-*c* specifically requires that in addition to said public notice the court shall cause a copy of said notice to be served by United States Marshal for the District of Columbia, or his deputies, upon such owners of the land to be condemned as can be found by the Marshal, or his deputies, within the District of Columbia, and upon the tenants and occupants of the same, but makes no provision for actual notice of any kind to owners of land to be assessed, and no attempt was made to give such notice to the Lynchburg Investment Corporation, though the petitioners well knew its interests by virtue of the fact that it has for many years paid taxes on large parcels of land in the proximity of the land sought to be condemned in this proceeding, and has for a long time appeared upon the assessment books of the District of Columbia as such owner, and it is still the owner among other property in the District of Columbia, of lots numbered 31, 32, 33, 34, and 35, in Square No. 2804, Lots numbered 11, 12, 13, 14, 16, 17, 18, and 19, in Square No. 2715, Lots numbered 2, 9, 10, 11 and 14 in Square No. 2716 Lots numbered 31, 32, 33, 34, 35, 36, 37 and 38 in Square No. 2803, Lots numbered 29, 30, 31, 32, 33, 34, 35, and 36 in Square No. 2802 and Lots numbered 15, 17, 18 and 19, in Square No. 2801, against all of which assessment for benefits has been made by the verdict of the jury returned in this cause.

8. Because, though Section 491-*g* of the Code expressly provides that "where part of any lot, piece, parcel or tract of land has been dedicated for the opening, extension, widening or straightening of a street, avenue, road or highway, the jury, in determining whether the remainder of said lot, piece, parcel or tract is to be assessed for benefits and the amount of benefits, if any, to be assessed thereon, shall also take into consideration the fact of such dedication, and the value of the land so dedicated", and though the said Lynchburg Investment Corporation, by sub-division plat duly recorded in Book 36, page 2, of the records of the office of the Surveyor of the District of Columbia heretofore, to wit, the 10th day of September, 1909, dedicated for the extension and widening of Colorado Avenue, Northwest more than fifty thousand square feet of ground, as will more fully and in detail appear by reference to the said recorded subdivision, which it is hereby prayed may be taken and read as a part of this motion, with leave hereafter to file a certified copy thereof.

31 The fact of this dedication was not brought to the attention of the jury by the petitioners, who well knew the facts and the Lynchburg Investment Corporation by reason of its lack

of notice of these proceedings had no opportunity to do so, and in consequence the jury in this case did not take into consideration the fact of such dedication or the value of the land so dedicated, and were not instructed by the court so to do.

9. Because the court instructed the jury that they should assess benefits upon all lots, pieces, or parcels of land "which the jury might find will be benefited by the said extension of Colorado Avenue and Kennedy Street," and, in the same connection, further instructed the jury that "by the extension of the avenue and street the jury are to understand its establishment, laying out and completion for all the ordinary uses of a public thoroughfare" instead of instructing the jury, as should have been done, that they could assess such benefits as they should find had actually accrued from the proposal of the contemplated extension and widening; and that they should not consider the proposed extension and widening as laid out and completed for the ordinary uses of a public thoroughfare, but should only consider whatever actual enhancement of the market value of the land had accrued from the said widening and extension or either of them.

10. Because the court instructed the jury that they might find and assess benefits if it should find "either that the fair market value of such parcel of land will be increased or that such parcel will be made available for some use for which it is not now available by reason of the withdrawal from private ownership of the land to be condemned and its appropriation for public use as a street."

11. Because the petition in this cause filed nowhere alleges that the land sought to be condemned is necessary for the extension and widening of Colorado Avenue, N. W. from Longfellow Street to Sixteenth Street a width of 120 feet, according to the plan for the permanent system of highways for the District of Columbia, and of Kennedy Street, N. W., through Lot numbered 800, Square No. 2718 with a width of 90 feet.

12. Because the petition in this cause filed does not allege that the proposed extension and widening of Colorado Avenue is according to the plan for the permanent system of highways for the District of Columbia.

13. Because the petition in this cause filed does not allege that the proposed extension and widening of Colorado Avenue is from Longfellow Street to Sixteenth Street as required by the Act of Congress.

14. Because the petition in this cause filed does not allege or show that the proposed extension and widening of Kennedy Street, N. W., through Lot numbered 800, Square 2718, is "with a width of 90 feet."

15. Because the assessment of damages to property owners in this cause made by the verdict of the jury is excessive.

16. Because the assessment of benefits against the Lynchburg Investment Corporation made by the verdict of the jury in this cause is excessive.

32 17. Because of errors of law committed in the trial of this cause before the jury and in instructing the jury.

LYNCHBURG INVESTMENT CORPORATION,
By FRANK P. HARMAN,
*President, Appearing Especially for the Purposes of this Motion and None Other.*

J. J. DARLINGTON,
W. C. SULLIVAN,
*Att'ys, Appearing Especially for the Purposes of this Motion and None Others.*

DISTRICT OF COLUMBIA, *ss:*

I, Frank P. Harman, on oath say that I am president of the Lynchburg Investment Corporation, and have read the foregoing motion to vacate by me subscribed with its name and as its president; that I know the contents of the foregoing and annexed motion and make this affidavit as the president of said Lynchburg Investment Corporation; that the statement- therein contained as of personal knowledge are true, and that those set forth upon information and belief I believe to be true.

FRANK P. HARMAN.

Subscribed and sworn to this 24th day of April, A. D. 1912.
[SEAL.] IRWIN H. LINTON,
*Notary Public, D. C.*

*Exceptions to Verdict.*

Filed April 24, 1912.

* * * * * * *

Now comes the Holmes Central Realty Corporation, the owner of property against which benefits are assessed by the award or verdict of the jury in the above entitled cause, which was filed herein on the 4th day of April, 1911, and excepts and objects to the said award or verdict on the following grounds:

1. The award of damages for the land is excessive.

2. The assessment of benefits as made against the property of this exceptant is excessive.

3. The Court failed to instruct the jury as provided by Section 491*g* of the Code of Laws for the District of Columbia that in determining the benefits to be assessed on this exceptant's lots or parcels of ground they should take into consideration the fact that parts of said lots of parcels had been dedicated for the extension and widening of said Colorado Avenue and Kennedy Street, and also the value of the said parts so dedicated as shown by plat duly recorded in office of Surveyor D. C.

4. Other errors of law were committed by the Court in instructing the jury.

5. Each and every of the several grounds of the motion to
33 vacate the said verdict this day filed by the Lynchburg Investment Corporation.

LECKIE, COX & KRATZ,
*Attorneys for the Holmes Central Realty Corporation.*

*Motion to Ratify and Confirm Verdict of Jury.*

Filed May 14, 1912.

* * * * * * *

Now come the Commissioners of the District of Columbia and move the Court to ratify and confirm the verdict of the jury heretofore filed herein notwithstanding the exceptions filed thereto.

E. H. THOMAS,
JAS. F. SMITH,
*Attorneys for Petitioners.*

*Order Overruling Exceptions.*

Filed May 23, 1912.

* * * * * * *

The cause came on upon the exceptions & objections filed to the verdict of the jury heretofore returned herein, and upon the motion to confirm said verdict notwithstanding said objections and exceptions, and was argued by counsel, & considered by the Court, whereupon, it is by the court this 23rd day of May 1912 ordered that the said objections & exceptions be, and the same are each and all overruled and that the said verdict, awards and assessments be, and the same are hereby in all respects finally ratified and confirmed.

By the Court:

JOB BARNARD, *Justice.*

From this order, an appeal is noted in open court by the exceptants, the Holmes Realty Company and the Lynchburg Investment Corporation, and allowed by the Court, with penalty of appeal bond fixed at $100. each.

By the Court:

JOB BARNARD, *Justice.*

*Memoranda.*

June 11, 1912, Appeal bonds approved and filed.

June 14, 1912, Time to file and settle bills of exceptions and transcript of record extended to and including the 15th day of August, 1912.

August 13, 1912, Bill of Exceptions submitted.

34 Supreme Court of the District of Columbia.

Session resumed pursuant to adjournment, present presiding Mr. Justice Barnard.

TUESDAY, August 13th, 1912.

* * * * * * *

Now comes the defendants, the Lynchburg Investment Corporation by their Attorneys J. J. Darlington and W. C. Sullivan, and The Holmes Central Realty Corporation by their Attorneys, Leckie, Cox & Kratz, and prays the court to sign and make a part of the record their bill of exceptions taken during the trial of this case and submitted to the Court on this 13th day of August A. D. 1912, which is accordingly done nunc pro tunc.

Filed August 13th, 1912.

In the Supreme Court of the District of Columbia.

No. 990, Dis. Doc.

In re THE EXTENSION AND WIDENING OF COLORADO AVENUE AND KENNEDY STREET NORTHWEST.

*Bill of Exceptions.*

Be it remembered that the above entitled cause came on for trial on the 8th day of March, A. D. 1912, before Mr. Justice Bernard and a jury of five persons which had theretofore been empanelled by the Court, James F. Smith, Esq., appearing for the petitioners, and various counsel appearing for different property owners, but no appearance being made or having been entered for or by the Lynchburg Investment Corporation until, or except by the motion hereinafter set out; and no appearance having been entered by the Holmes Central Realty Corporation before the verdict, counsel for which, however, was present in Court at the time said cause was argued to the jury.

And thereupon to maintain the issues upon their part joined, the petitioners and various property owners then appearing offered evidence tending to show the value of the land and premises sought to be condemned and the amount and extent of the benefit which would accrue to lands and premises in the District of Columbia by the extension and widening of Colorado Avenue and of Kennedy Street, Northwest, as proposed in and by the petition in this cause filed, but no testimony was offered tending to show the dedication by either the Lynchburg Investment Corporation or the Holmes Central Realty Corporation of any land or premises whatever, in the line of said Colorado Avenue or of said Kennedy Street for the opening, extension or widening thereof, or otherwise.

35 And thereupon, the case being announced closed by the petitioners and property owners then appearing, and the foregoing being all of the evidence given by the respective

parties, the petitioners, by their counsel requested the court to give the following instructions to the jury, and the court granted the said instructions:

1. The jury are instructed that, after ascertaining the amount of damages to be awarded to the owners of land to be taken for the extension of Colorado Avenue and Kennedy Street, Northwest, for which this proceeding has been instituted, they shall then proceed to assess the full amount of damages, together with the costs of this proceeding, as benefits, and to the extent of such benefits, against the lots, pieces or parcels of land on each side of Colorado Avenue and Kennedy Street to be extended, and upon any and all other lots, pieces or parcels of land which the jury may find will be benefitted by said extension of Colorado Avenue and Kennedy Street, as the jury may find said lots, pieces or parcels of land will be benefitted; and in determining the amounts to be assessed against said lots, pieces or parcels of land, the jury shall take into consideration the respective situations and topographical conditions of said lots, pieces or parcels of land, and the benefits and advantages they may severally receive from the said extension of the said avenue. By the extension of the avenue or street the jury are to understand its establishment, laying out and completion for all the ordinary uses of a public thoroughfare. The jury are instructed, however, that it is not incumbent on them to assess benefits arbitrarily; they should assess benefits only where they find an actual enhancement in value will accrue to the property by reason of the extension of said Avenue.

2. The several pieces or parcels of land to be taken for the purposes of this proceeding are to be appraised at their present fair market value, reference being had to the most advantageous use to which the property could be put by private individuals or corporations. By fair market value is meant the price for which the property could be sold, in cash or on terms equivalent to cash, by one who desires, but is not obliged to sell to one who desires, but is not obliged to buy.

And thereupon the property owners in attendance by their counsel, requested the court to give, but the court refused to give, the following instructions:

1. "The jury are instructed that the burden of proof rests upon the District of Columbia to show to the satisfaction of the jury the extent of the special benefits which will directly result to property from the extension and widening of Colorado Avenue and Kennedy Street, Northwest, as proposed herein."

And, to the refusal of the court to give the said instructions the property owners then present, by their counsel, objected and excepted, and prayed the court to note the said exception upon its minutes, and the same at the request of counsel for the property owners present, was then and there duly noted on the minutes of the court.

And thereupon the said property owners, by their counsel, requested the court to give and the court did give the following instructions to the jury:

36 3. The jury are instructed that only special and direct benefits capable of present estimate and reasonable computa-

tion, are to be assessed, and contingent and speculative benefits arising in the future from the actual opening and improvement of Colorado Avenue, as extended, are not to be considered.

3. The jury are instructed that the several lots, or parcels of land to be condemned are to be appraised at their fair market value, with reference to the most valuable use or uses to which they can or may be lawfully put. And the market value of said lots, pieces or parcels of land is not limited to the use or uses to which they are now applied by the owners thereof, or to their present income from such property, and if any of said lots, pieces or parcels of land, by reason of its location, surroundings, natural advantages or intrinsic character, is peculiarly adapted to some particular use or uses, the circumstance or circumstances which make up such adaptability shall be considered by the jury. By fair market value is meant what the property would sell for, in cash, or on terms equivalent to cash, when offered for sale by one who desires but is not obliged to sell, to one who desires but is not obliged to buy.

4. Where a part only of the lot is taken, the owner should be awarded its value when considered with reference to the whole lot and as a part thereof.

And thereupon the said property owners, by their counsel, requested the court to give, and the court refused to give, the following instruction to the jury:

5. The jury are instructed that where only a part of a lot or parcel is taken and they find that by the taking thereof the remaining portion of the lot or parcel is damaged, they shall allow for such damage to the owner for the remaining part, and in estimating such damages the measure thereof is the depreciation of the market value of the remaining portion of such lot or parcel of land; and any such damages shall be in addition to the damages allowed for the value of the part actually taken.

And to the refusal of the court to grant the said instruction, the property owners then present, by their counsel, duly objected and excepted, and prayed the court to note the said exception upon its minutes, and the same at the request of counsel for the property owners then present was then and there duly noted on the minutes of the court.

And thereupon the said property owners, by their counsel, requested the court to give, and the court did give, the following instructions to the jury:

6. The jury are instructed that, in assessing benefits, they cannot indulge in vague speculation or conjecture, but can only assess against the property such benefits only, if any, as, in their opinion, the property assessed may be benefitted by reason of the extension and widening of Colorado Avenue, Northwest, from Longfellow Street to Sixteenth Street, and of Kennedy Street, Northwest, through Lot numbered 800, in square No. 2718, over and above the ordinary benefit which the community at large or general public may derive therefrom.

37 7. The jury are instructed that, in order to find that any lot or parcel of land will be specially benefitted as distinct

from the general benefit accruing to other lands, they must find either that the fair market value of such parcel of land will be increased or that such parcel will be made av-ilable for some use for which it is not now available by reason of the withdrawal from private ownership of the land to be condemned and its appropriation for public use as a street.

8. The jury are instructed that the benefits as well as the damages are to be estimated as of the date of the appropriation or taking of the land sought to be condemned.

And thereupon, the foregoing being all of the instructions presented to the Court for submission to the jury, and the instructions above indicated as having been granted by the court being all of the instructions then and there given to the jury, the case was submitted to the jury, which thereafter returned their verdict awarding damages and assessing benefits as of record in this cause, which verdict by this reference thereto is hereby made a part of this bill of exceptions.

And there-pon the Lynchburg Investment Corporation filed in the said cause its motion in the words and figures following, to vacate the said verdict:

*Motion to Vacate Verdict.*

Now comes the Lynchburg Investment Corporation, a body corporate of the State of Virginia, appearing specially for the purpose of this motion and for none other, and, respectfully showing to the court that it was not made a party to the petition filed herein, that the said petition contained no prayer for process against it, and that it had no notice of the pendency of this proceeding either actual or constructive, unless said notice is to be implied from the fact of publication, moves the court to vacate the verdict of the jury filed herein, in so far as it is concerned, for the following reasons:

1. Notice of publication passed heretofore, to wit, the 28th day of November, A. D. 1911, was defective and insufficient to give the court any jurisdiction over the Lynchburg Investment Corporation or its real estate, because it did not give notice that an assessment would be made of benefits which had actually been sustained, but only the benefits which "the jury might find will be" sustained "by the said extension and widening."

2. Because the petition in this cause does not seek the assessment of benefits which are actually sustained by the property, but, instead, an assessment of the benefits resulting from the proposed extension and widening.

3. Because public notice of not less than twenty days was not given of the institution of this proceeding, by advertising in three daily newspapers published in the District of Columbia, as provided by section 491-*c* of the Code, and consequently the court
38 never acquired jurisdiction to assess benefits against the said Lynchburg Investment Corporation or any of the land owned by it.

4. Because the order of publication passed herein on the 28th

day of November, A. D., 1911, did not conform to the requirements of the said section 491-*c*, but, instead, warned and commanded the parties to appear on January 9th, 1912, and required that a copy of that order "be published once in the Washington Law Reporter and on six secular days in the Washington Evening Star, the Washington Herald, and the Washington Post, commencing at least 20 days before the said 9th day of January, A. D. 1912," and the said order was only published in each of the said papers six times, which was not "public notice of not less than twenty days."

5. Because, though the order of publication passed on November 28th, A. D. 1911, required that it be published in the three newspapers therein mentioned on six secular days, it was only published in the Evening Star on five secular days, one of the six publications being had on Saturday, December 2nd, in the afternoon of that day, which was a legal holiday and therefore not a secular day under the order.

6. Because the said Lynchburg Investment Corporation was nowhere named in the petition in this cause or in the papers annexed thereto, was not served with process, and had no notice of the pendency of this proceeding until after the conclusion of the hearing.

7. Because notice of publication did not constitute due process of law against the Lynchburg Investment Corporation, because of the insufficiency, in the several respects above noted, of the publication actually had, and also because of the unjust discrimination made in the statute between proceedings against the owners of land to be condemned and the owners of land to be assessed for benefits in that section 491-*c* specifically provides that in addition to said public notice the court shall cause a copy of said notice to be served by the United States Marshal for the District of Columbia, or his deputies, upon each owners of the land to be condemned as can be found by the Marshal, or his deputies, within the District of Columbia, and upon the tenants and occupants of the same; but makes no provision for actual notice of any kind to owners of land to be assessed, and no attempt was made to give such notice to the Lynchburg Investment Corporation, though the petitioners well knew its interest by virtue of the fact that it has for many years paid taxes on large parcels of land in the proximity of the land sought to be condemned in this proceeding, and has for a long time appeared upon the assessment books of the District of Columbia as such owner, and it is still the owner, among other property in the District of Columbia, of lots numbered 31, 32, 33, 34, and 35, in Square No. 2804, Lots numbered 11, 12, 13, 14, 16, 17, 18 and 19 in Square No. 2715, Lots numbered 2, 9, 10, 11, and 14 in Square No. 2716, Lots numbered 31, 32, 33, 34, 35, 36, 37 and 38, in Square No. 2803, Lots numbered 29, 30, 31, 32, 33, 34, 35 and 36 in Square 2802 and Lots numbered
39 15, 17, 18 and 19, in Square No. 2801, against all of which assessment for benefits has been made by the verdict of the jury returned in this cause.

8. Because, though section 491-*g* of the Code expressly provides that "where part of any lot, piece, parcel or tract of land has been dedicated for the opening, extension, widening or straightening of

a street; avenue, road or highway, the jury in determining whether the remainder of said lot, piece, parcel or tract is to be assessed for benefits and the amount of the benefits, if any, to be assessed thereon, shall also take into consideration the fact of such dedication, and the value of the land so dedicated," and though the said Lynchburg Investment Corporation by sub-division plat duly recorded in Book 36, page 2, of the records of the office of the Surveyor of the District of Columbia, heretofore, to wit, the 10th day of September, 1909, dedicated for the extension and widening of Colorado Avenue, Northwest, more than fifty thousand square feet of ground, as will more fully and in detail appear by reference to the said recorded sub-division, which it is hereby prayed may be taken and read as a part of this motion, with leave hereafter to file a certified copy thereof, the fact of dedication was not brought to the attention of the jury by the petitioners, who well knew the facts, and the Lynchburg Investment Corporation, by reason of its lack of notice of these proceedings, had no opportunity to do so, and in consequence the jury in this case did not take into consideration the fact of such dedication or the value of the land so dedicated, and were not instructed by the court so to do.

9. Because the court instructed the jury that they should assess benefits upon all lots, pieces, or parcels of land "which the jury might find will be benefited by the said extension of Colorado Avenue and Kennedy Street;" and, in the same connection, further instructed the jury that "by the extension of the avenue and street the jury are to understand its establishment, laying out and completion for all the ordinary uses of a public thoroughfare;" instead of instructing the jury as should have been done that they should assess such benefits as they should find had actually accrued from the proposal of the contemplated extension and widening; and that they should not consider the proposed extension and widening as laid out and completed for the ordinary uses of a public thoroughfare, but should only consider whatever actual enhancement of the market value of the land had accrued from the said widening, extension or either of them.

10. Because the court instructed the jury that they might find and assess benefits if it should find "either that the fair market value of such parcel of land will be increased or that such parcel will be made available for some use for which it is not now available by reason of the withdrawal from private ownership of the land to be condemned and its appropriation for public use as a street."

11. Because the petition in this cause filed nowhere alleged that the land sought to be condemned is necessary for the extension and widening of Colorado Avenue, N. W. from Longfellow Street to Sixteenth Street, N. W., with a width of 120 feet, according to the plan for the permanent system of highways for the District of Columbia, and of Kennedy Street, N. W., through lot numbered 800, Square No. 2718, with a width of 90 feet.

12. Because the petition in this cause filed does not allege that the proposed extension and widening of Colorado Avenue is accord-

ing to the plan for the permanent system of highways for the District of Columbia.

13. Because the petition in this cause filed does not allege that the proposed extension and widening of Colorado Avenue is from Longfellow Street to Sixteenth Street as required by the Act of Congress.

14. Because the petition in this cause filed does not allege or show that the proposed extension and widening of Kennedy Street, N. W., through Lot numbered 800, Square No. 2718, is "with a width of 90 feet."

15. Because the assessment of damages to property owners in this cause made by the verdict of the jury is excessive.

16. Because the assessment of benefits against the Lynchburg Investment Corporation made by the verdict of the jury in this cause is excessive.

17. Because of errors of law committed in the trial of this cause before the jury and in instructing the jury.

LYNCHBURG INVESTMENT CORPORATION,
By FRANK P. HARMAN (Signed), *President,*

——— ———,
*Appearing Specially for the Purposes of This Motion and None Other.*

J. J. DARLINGTON AND
W. C. SULLIVAN,
*Att'ys Appearing Specially for the Purpose of This Motion and None Other.*

DISTRICT OF COLUMBIA, *ss:*

I, Frank P. Harman, on oath say that I am president of the Lynchburg Investment Corporation, and have read the foregoing motion to vacate by me subscribed, in its name and as its president, that I know the contents of the foregoing and annexed motion to vacate and make this affidavit as the president of the said Lynchburg Investment Corporation; that the statements therein contained as of personal knowledge are true, and that those set forth upon information and belief I believe to be true.

FRANK P. HARMAN. (Signed.)

Subscribed and sworn to before me this 24th day of April, A. D. 1912.

[NOTARIAL SEAL.] IRWIN H. LINTON (Signed),
*Notary Public, D. C.*

Copy of the plat mentioned in said motion and filed and submitted to the court is hereto annexed, marked "Lynchburg
41 Investment Corporation Exhibit," and is hereby made a part of this bill of exceptions.

The Holmes Central Realty Corporation also filed its motion in the words and figures following, to vacate the verdict:

*Exceptions to Verdict.*

Now comes the Holmes Central Realty Corporation, the owner of property against which benefits are assessed by the award or verdict of the jury in the above entitled cause, which was filed herein on the 4th day of April, 1911, and excepts and objects to the said award or verdict on the following grounds:

1. The award of damages for the land taken is excessive.

2. The assessment of benefits as made against the property of this exceptant is excessive.

3. The Court failed to instruct the jury as provided by Section 491-*g* of the Code of Laws for the District of Columbia that in determining the benefits to be assessed on this exceptant's lots or parcels of ground they should take into consideration the fact that parts of said lots or parcels had been dedicated for the extension and widening of said Colorado Avenue and Kennedy Street, and also the value of the said parts so dedicated, as shown by plat duly recorded in the office of the Surveyor for the District of Columbia.

4. Other errors of law were committed by the Court in instructing the jury.

5. Each and every of the several grounds of the motion to vacate the said verdict this day filed by the Lynchburg Investment Corporation.

LECKIE, COX & KRATZ,
*Attorneys for the Holmes Central Realty Corporation.*

Copy of the plat mentioned in said motion which was filed and submitted to the court is hereto annexed, marked "Holmes Central Realty Corporation Exhibit," and is hereby made a part of this bill of exceptions.

And the said motions duly coming on to be heard, were, by the court, on, to wit the 23d day of May, A. D. 1912, overruled, and the said verdict of the jury was then and there by the court ratified and confirmed, as also appears by the order of the court passed on said date and of record in said cause, which said order is by this reference thereto hereby made a part of this bill of exceptions; to which action of the court in overruling their respective motions the Lynchburg Investment Corporation and the Holmes Central Realty Corporation, by their respective counsel, then and there, severally and separately, duly objected and excepted and prayed the court to note said exceptions upon its minutes, and the same at the request of the respective counsel for the said corporations were then and there, severally and separately, duly noted on the minutes of the court.

42 Be it further remembered that the foregoing comprises the substance of all the testimony given and all the proceedings had in and subsequent to the trial of the said case, and that each of the said several exceptions taken in the course of the trial of the said cause, and heretofore set out, were so taken before the jury retired, separately and severally, and that each of said exceptions, and the

CHART

TOO

LARGE

FOR

FILMING

exception to the overruling of the motion to vacate the said verdict was, at the time of the taking thereof, respectively, separately and severally duly noted upon the minutes of the court by the justice then and there at the time presiding, and that upon the overruling of its said motion to vacate the said verdict, the said Lynchburg Investment Corporation, by its counsel, and upon the overruling of its said motion the said Holmes Central Realty Corporation, by its counsel, then and there prayed the court to sign this bill of exceptions, to have the same force and effect as if each of said exceptions hereinbefore set out had been separately and severally set forth in a separate bill of exceptions by the Lynchburg Investment Corporation, and as if each of said exceptions had also been set out sep-rately and severally by the Holmes Central Realty Corporation in another separate bill of exceptions, and with the full benefit to the said Lynchburg Investment Corporation of each of the exceptions noted at the trial of said cause, as hereinbefore set out, and without prejudice to any of the rights of the said Lynchburg Investment Corporation; all of which at the request of counsel for the said Lynchburg Investment Corporation and of counsel for the Holmes Central Realty Corporation is accordingly done, and this bill of exceptions is signed and sealed, and made a part of the record of this cause, now for then, this 13th day of August, A. D., 1912.

JOB BARNARD, *Justice*. [SEAL.]

(Here follow drawings marked pages 42½ and 42¾.)

*Memorandum.*

August 13, 1912.—Time to file transcript of record in Court of Appeals further extended to and including the 15th day of September, 1912.

*Assignment of Errors.*

Filed August 26, 1912.

* * * * * * *

Now come the respondents, the Lynchburg Investment Corporation and Holmes Central Realty Corporation, appellants in the above entitled cause, — jointly, severally and separately, assign for
43 review on appeal, errors committed by the trial court in the following particulars:

1. In not granting the first prayer offered and requested by the property owners concerning the verdict of proof.

2. In not granting the fifth prayer offered and requested by the property owners.

3. In not granting the motion of the Lynchburg Investment Corporation to vacate the verdict of the jury.

4. In not sustaining the exceptions of the verdict of the jury filed by the Holmes Central Realty Corporation.

5. In not holding that the court had not acquired jurisdiction over the appellants, or either of them, or the real estate of them, or of either of them.

6. In not holding that the court had not acquired jurisdiction over the appellants or either of them, or the real estate of them or of either of them, by the notice of publication, because public notice of not less than twenty (20) days was not given of the institution of the proceedings in the lower court, by advertisement in three daily newspapers published in the District of Columbia.

7. In holding that the court had acquired jurisdiction over the appellants or either of them, or the real estate of them, or of either of them, without giving public notice of not less than twenty (20) days by advertisement in three daily newspapers published in the District of Columbia.

8. In holding that publication of the notice to appear once in the Washington Law Reporter and on six secular days in the Washington Evening Star, the Washington Herald, and the Washington Post commencing at least twenty days before the return day, constituted notice of not less than twenty days.

9. In holding that the Court had acquired jurisdiction over the appellants, or either of them, or the property of them, or either of them, notwithstanding the fact that they were, and each of them was, non-resident corporations, nowhere named in the petition or the prayers, not served with process, and that actual notice of the pendency of the proceeding until the conclusion of the hearing.

10. In not vacating the verdict, and in not sustaining the exceptions thereto, because of the failure of the petitioners to discharge

the duty imposed upon them by law of advising the court and the jury of the fact of the dedication of land by the appellants and each of them, in the line of Colorado Avenue or Kennedy Street, at the point of the proposed extension.

11. In that the petitioners failed to discharge the duty imposed upon them by law of advising the court and the jury of the fact of the dedication of land by the appellants and each of them, in the line of Colorado Avenue or Kennedy Street, at the point of the proposed extension.

12. In failing to charge the jury and also in failing to vacate the verdict or sustain the exceptions thereto, because of such failure to charge the jury, that where part of any lot, piece, parcel or
44 tract of land has been dedicated for the opening, extension, widening or straightening of a street, avenue, road or highway, the jury, in determining whether the remainder of such lot, parcel, or tract should be assessed for benefits and the amount of benefits if any, to be assessed thereon, should also take into consideration the fact of such dedication and the value of the lot so dedicated.

13. In that the jury did not take into consideration, in making up the verdict, the fact of the dedication by the appellants or either of them, of land for the opening, extension, widening or straightening of Colorado Avenue and Kennedy Street or the value of the land so dedicated; and also in failing to vacate the verdict and of sustaining the exceptions thereto because of such failure of the jury to take into consideration such fact of dedication.

14. In instructing the jury that they should assess benefits upon all lots, piece- or parcels of land which they might find would be benefited by the said extension of Colorado Avenue and Kennedy Street, instead of instructing them that they should assess such benefits only as they should find had actually accrued by reason of the said extension at the time of returning their verdict.

15. In instructing the jury that, by the extension of Colorado Avenue and Kennedy Street they should understand their establishment, laying out and completion for all the ordinary uses of a public thoroughfare.

16. In instructing the jury that they might find and assess benefits if they should find either that the fair market value of the parcel of land to be assessed would be increased or that such parcel would be made available by reason of the withdrawal from private ownership of the land to be condemned and its appropriation for public use as a street.

W. C. SULLIVAN,
*Attorney for Lynchburg Investment Corporation.*
LECKIE, COX & KRATZ,
*Attorneys for Holmes Central Realty Corporation.*

*Directions to Clerk for Preparation of Transcript of Record.*

Filed August 27, 1912.

* * * * * * *

Now come the Lynchburg Investment Corporation and the Holmes Central Realty Corporation, respondents appellants in the above entitled cause, and designate the following to constitute the transcript of record upon their appeal in the said cause:

1. Petition and exhibit, — filed November 28, 1911.
2. Notice of order of publication, filed November 28, 1911.
3. Proofs of publication, filed January 9, 1912.
4. Memo. of order directing securing of jury, filed January 9, 1912.

45 5. Memo. of order accepting and directing jury, filed January 26, 1912.

6. Memo. of case submitted to jury March 8, 1912.
7. Verdict of jury, filed April 4, 1912.
8. Motion of Lynchburg Investment Corporation to vacate verdict, filed April 24, 1912.
9. Exceptions to verdict by Holmes Central Realty Corporation, filed April 24, 1912.
10. Motion of the District of Columbia to confirm verdict, filed May 4, 1912.
11. Memo. of order over-ruling exceptions and confirming verdict and notices of appeal, filed May 23, 1912.
12. Memo. of filing of appeal bond and of extensions of time duly had.
13. Assignment of errors filed August 26th, 1912.
14. Memo. of submission of bill of exceptions to court, and of order making the same part of the record.
15. Bill of exceptions.
16. Memo. showing all appearances entered in cause with dates of respective entries.

W. C. SULLIVAN,
*Attorney for Lynchburg Investment Corporation.*
LECKIE, COX & KRATZ,
*Attorney- for Holmes Central Realty Corporation.*

James Francis Smith, Esq., Attorney for Petitioners.

SIR: Please take notice that we have this day filed the foregoing designation of record on appeal in the above entitled cause.

W. C. SULLIVAN,
*Attorney for Lynchburg Investment Corporation.*
LECKIE, COX & KRATZ,
*Attorney- for Holmes Central Realty Corporation.*

Service acknowledged this 27th day of August A. D. 1912.
J. F. SMITH,
Per M. F.

*Memorandum.*

August 27, 1912.—Time to file transcript further extended to and including October 1, 1912.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
*District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 71 inclusive, to be a true and correct transcript of the record,
46 as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 990, District Court, entitled "In re: The extension and widening of Colorado Avenue and of Kennedy Street, Northwest," as the same remains upon the files and of record in said Court.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 28th day of September, A. D. 1912.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2468. Lynchburg Investment Corporation et al., appellants, vs. Cuno H. Rudolph et al. Court of Appeals, District of Columbia. Filed Sep. 28, 1912. Henry W. Hodges, clerk.

47 Tuesday, February 4th, A. D. 1913.

No. 2468.

LYNCHBURG INVESTMENT CORPORATION and HOLMES CENTRAL REALTY CORPORATION, Appellants,
vs.
CUNO H. RUDOLPH, JOHN A. JOHNSTON, and WILLIAM V. JUDSON, Commissioners of the District of Columbia.

The argument in the above entitled cause was commenced by Mr. J. W. Cox, attorney for the appellants, and was continued by Mr. J. F. Smith, attorney for the appellees, and was concluded by Mr. W. C. Sullivan, attorney for the appellants.

On motion the appellants are allowed to file additional authorities herein if so advised.

48 In the Court of Appeals of the District of Columbia, October Term, 1912.

No. 2468.

LYNCHBURG INVESTMENT CORPORATION et al., Appellants,
vs.
CUNO H. RUDOLPH et al., Commissioners of the District of Columbia.

There appearing to be some divergence of statement in the brief and in the bill of exceptions as to the exact facts relating to the appearance of the Holmes Central Realty Corporation, it is stipulated and agreed by and between counsel that the facts are as follows:

No formal appearance was entered by the Holmes Central Realty Corporation before verdict. Only one session of the Court for the hearing of testimony was had, viz: March 8, 1912, at which hearing A. E. L. Leckie was present and participated on behalf of the Holmes Central Realty Corporation, not having appeared or taken any part in any of the prior proceedings.

LECKIE, COX & KRATZ,
*Attorneys for Appellants.*
E. H. THOMAS,
JAS. FRANCIS SMITH,
*Attorneys for Appellees.*

(Endorsed:) No. 2468. Lynchburg Investment Corporation, et al. vs. Cuno H. Rudolph, et al. Stipulation. Court of Appeals, District of Columbia. Filed Feb. 11, 1913. Henry W. Hodges, Clerk.

49 No. 2468.

LYNCHBURG INVESTMENT CORPORATION and HOLMES CENTRAL REALTY CORPORATION, Appellants,
v.
CUNO H. RUDOLPH, JOHN A. JOHNSTON, and WILLIAM V. JUDSON, Commissioners of the District of Columbia.

*Opinion.*

Mr. Justice VAN ORSDEL delivered the opinion of the Court:

This is an appeal from an order of the Supreme Court of the District of Columbia confirming the verdict of the jury in a condemnation proceeding. The proceedings were instituted by the Commissioners of the District of Columbia under the provisions of the act of Congress approved June 30, 1911 (37 Stat. L., 1), authorizing the extension and widening of Colorado Avenue Northwest, from Longfellow Street to Sixteenth Street, and Kennedy Street through lot numbered 800, square numbered 2718.

The Commissioners were required within six months after
50 the passage of the act to initiate proceedings in accordance with the provisions of subchapter 1 of Chapter XV of the Code of the District of Columbia for the condemnation of the necessary land and the assessment of benefits upon the property benefited by the opening of the streets. The petition was filed, notice by publication given, and a jury appointed. The jury returned a verdict awarding damages and assessing benefits. Appellants filed exceptions to the verdict, which were overruled, and an order was entered confirming the verdict. The exceptions may be considered in the following order:

(1) Insufficiency of notice.

(2) Failure of the court to instruct the jury that the burden of proof was upon the District to show the extent of special benefits that would result to appellants' property from the opening of said street and avenue.

(3) Failure of the court to instruct the jury that, in determining the amount of benefits to be assessed against the land of appellants, consideration should be given to the fact that appellants had already dedicated part of their land for the extension and widening of the street and avenue in question.

Notice was given by publication. The order provided that a copy of the "notice and order be published once in the Washington Law Reporter, and on six secular days in the Washington Evening Star, The Washington Herald, and the Washington Post, newspapers published in the said District, commencing at least twenty days before the said 9th day of January, A. D. 1912." It appears that the publication so ordered was made and completed within nine days, and the last publication was made thirty-two days prior to the appearance day.

Section 491c, D. C. Code, authorizing service by publication, provides: "The said court shall cause public notice of not less than twenty days to be given of the institution of such proceeding, by advertisement in three daily newspapers published in the District of Columbia, which notice shall warn and require all persons having any interest in the proceeding to appear in court at a day to be named in said notice, and to continue in attendance until the court shall have made its final order ratifying and confirming the award of damages and the assessment of benefits by the jury herein provided for; and in addition to such public notice said court shall cause a copy of said notice to be served by the United States marshal for the District of Columbia, or his deputies upon such owners of the land to be condemned as can be found by said marshal, or his deputies, within the District of Columbia, and upon the tenants and occupants of the same." The notice provided for is intended to reach two classes of property owners; first, it is the only notice provided to be given those against whom assessments for benefits may be made, due to the fact that such persons can only be ascertained from the return of the jury, neither the court nor the Commissioners of the District being advised in advance of the persons who may be embraced within this class; second, those whose land is to be con-

demned, of whom the court has notice in advance from the petition, which is required to "contain a particular description of the land to be condemned and the names of the owners of the fee of said land and their residences, so far as the same may be ascertained, together with a plan of the land to be taken." D. C. Code, sec. 491*b*. As to this class, additional summons by the marshal is required where possible. It appears, however, that appellants were the owners of lots abutting on both Colorado Avenue and Kennedy Street, portions of which had been dedicated to the District for the opening and widening of said streets. Appellants, therefore, had no land subject to condemnation under this proceeding. Their sole interest centered in the amount of assessment for benefits which they might be required to pay. Notice could only be given them, therefore, through the medium of publication.

The validity of the service by publication is assailed upon the ground that the notice should have been published daily for at least twenty days immediately preceding the appearance day. The statute is not difficult to construe. It clearly requires that notice shall be published in three daily papers for at least twenty days. This requirement can not be satisfied by six insertions of the notice in three daily papers thirty-two days before the appearance day. If six insertions of the notice are sufficient, one is sufficient; and if it can be inserted thirty-two days before the appearance day, it could be inserted six months before. In Delogny et al. v. Smith et al., 3 La., 418, 423, the court, dealing with a similar situation, said: "The law does not say whether the three months in which the sale should be advertised, are the three months immediately preceding the sale. But we think that such is the sound construction. Otherwise the corporation might give the notice at any time they pleased, and at so great an interval of time as to render nugatory nearly all the objects to be attained by advertising."

It is well settled by the State decisions construing similar statutes that if the notice is required to be published for a certain period, or not less than a certain number of days before return day, if the publication is required to be made in a daily paper it means daily publication for that period. Stine v. Wilkson et al., 10 Mo., 75; Washington v. Bassett et al., 15 R. I., 563; Allen et al. v. Kerr et al, 13 Lea (Tenn.), 256. If publication is required to be made in a weekly paper, the notice must be published each week during the period. Armstrong et al. v. Scott, 3 Greene (I.), 433; Leffler v. Armstrong, 4 Iowa, 482. And where publication is required to be made for a certain number of days before the return day, and no daily paper is available in which to publish the notice, it is sufficient if the notice be published in a weekly paper each week during the period. Land Co. v. Loan & Trust Co., 52 Neb., 410, Leffler v. Armstrong, supra. In the present case, notice by publication is the only method provided for notifying persons against whose property benefits may be assessed. It is of the highest importance that every one interested should have due notice. To that end wide publicity of the proposed proceedings should be given. The object of notice is to give the owners of property to be affected by the proposed pro-

ceedings opportunity to defend against the lien for taxes to be charged against it. One of the chief constitutional guaranties is that no one shall be deprived of his property or his liberty without due notice and an opportunity to be heard in his own defense. "No principle is more vital to the administration of justice than that no man shall be condemned in his person or property without notice, and an opportunity to make his defense. And every departure from this fundamental rule, by a proceeding in rem, in which a publication of notice is substituted for a service on the party, should be subjected to a strict legal scrutiny. Jurisdiction is not to be assumed and exercised in such cases upon the general ground that the subject-matter of the suit is within the power of the court. This would dispense with the forms of the law, prescribed by the legislature, for the security of absent parties. The inquiry should be, Have the requisites of the statute been complied with so as to subject the property in controversy to the judgment of the court, and is such judgment limited to the property named in the bill? If this can not be answered in the affirmative, the proceedings of the court beyond their jurisdiction are void." Boswell's Lessee v. Otis et al., 9 How., 336, 350.

In matters affecting private property rights of persons, companies, or corporations, where it is sought to take it for the public good, liberal construction should be indulged in favor of the parties thus affected, and every step required to be taken by the public officials in thus subjecting private property to public use must be literally followed. As was said in Fay v. Macfarland, 32 App. D. C., 295: "The Commissioners are creatures of statute. They possess no implied powers. Their authority to act must be gathered from the express terms of the law granting it. Hence, in any attempt to act under a statute granting authority, they must comply literally with its requirements. Neither has the court any implied jurisdiction in the premises. Every requirement of a statute conferring jurisdiction upon the court to entertain a proceeding, providing a legal method of taking private property, must be complied with to the letter. It must clearly appear, either by express admission of the parties or by competent evidence, that all the jurisdictional requirements are present before the court can lawfully proceed."

The failure of the court below to establish its jurisdiction by proper notice against appellants is fatal, and renders the whole proceeding void and of no effect.

The failure of the court to instruct the jury that the burden was upon the District to establish by a preponderance of the evidence the extent of the special benefits accruing to the property as a basis for the assessment of benefits was error. The burden of establishing a fact is upon the affirmative party. Here, the whole proceeding was initiated primarily for the benefit of the District, and at the instance of its Commissioners. Appellants were not required to assume the burden of proving the negative proposition that they were not benefited to a certain amount. It was upon the District to establish by competent proof the amount of the benefits before appellants could be put upon their defense. In these proceedings relating to

the assessment of benefits, the District stands in the light of a plaintiff, and the property owners are defendants. The assessment of the jury must rest upon sufficient evidence, since there is no presumption of law as to its correctness. Mayor of Baltimore *v.* Brick Co., 80 Md., 458. In Baltimore City v. Hurlock, 113 Md., 674, the court said: "In the case of assessing benefits from opening a street, the initial question is as to the existence or creation of benefits as a fact. The opening of the street may result in damage instead of benefit to the property. Before the alleged benefits can be assessed it must be shown that there are benefits to be assessed, and the burden of proof is, and must be, upon every principle of law upon the one alleging the existence of benefits, not only to show the existence, but the extent of such benefits." We are not unmindful that the act of Congress fixes the total amount of the benefits in the present case as equivalent to the award of damages, but if the burden of proof is upon the one alleging the benefits where they are not already ascertained in the act, certainly, on the same reasoning, the burden would be upon the party instituting the condemnation proceedings to establish by competent evidence the proportion of the total benefits that should be assessed upon each individual piece of property within the entire radius. It is unnecessary to decide whether it was reversible error to refuse this instruction in the light of the other instructions given, since there must be a reversal upon other grounds.

Appellants assail the judgment chiefly upon the failure of the court to instruct the jury that in the assessment of benefits it should take into consideration the value of the land theretofore dedicated to the District by appellants. Section 491*g* of the District Code, among other things provides: "Where part of any lot, piece, parcel, or tract of land has been dedicated for the opening, extension, widening, or straightening of the street, avenue, road, or highway, the jury, in determining whether the remainder of said lot, piece, parcel, or tract is to be assessed for benefits, and the amount of benefits, if any, to be assessed thereon, shall also take into consideration the fact of such dedication and the value of the land so dedicated."

It appears that upon the basis of the lowest valuation fixed by the jury the value of the land dedicated by appellant Lynchburg Investment Corporation is $21,000, and upon the same basis the value of the land dedicated by appellant Holmes Central Realty Corporation is $15,000. From an examination of the record, we are convinced that the jury did not take into consideration these valuable dedications to the District in assessing benefits. In fact, in the bill of exceptions it is stated that no evidence was presented on this subject. Appellants' lands seem to have been assessed higher than those who had made no dedication. Indeed, it is difficult to determine upon what hypothesis the jury proceeded in assessing benefits in this case. The quality of an assessment must be apparent upon the face of the record. Brandenburg v. District of Columbia, 205 U. S., 135. It is no answer that appellants did not request this instruction. It was the duty of the court to follow the plain mandates of the law. The dedication of the land in question was a fundamental issue in arriving at a just assessment. In fact, no just assessment could be made without first considering the dedication.

The court in Brown v. Macfarland, 19 App. D. C., 525, considering a similar mandatory provision relative to condemnation proceedings, said: "It is urged that the appellants did not, in terms,
52 demand that the second jury of twelve should be ordered, and therefore the court was justified in ratifying the verdict of seven. But it must be borne in mind that it was not the duty of the appellants, as owners of lands proposed to be condemned, to demand a summoning of a second jury. The statute does not require it of them. That is the duty of the authorities authorized to institute and prosecute the proceedings of condemnation to completion. The owners of the land proposed to be condemned are placed in the position of defendants or opponents of the proceeding of condemnation; and, consequently, all affirmative acts prescribed by the statute in perfecting the proceeding, must be shown to have been complied with by the parties authorized to take and prosecute the proceeding. The whole proceeding is strictly statutory, and it must be affirmatively shown that all the provisions of the statutes that apply to the proceedings have been substantially complied with. Otherwise the whole proceeding would be void and without effect."

There is no theory upon which the omission of the court can be regarded as harmless error. Neither can the error be corrected by the reversal of the judgment in part, as may be done under the statute where the correction will work no injustice. It is impossible here to separate the assessments for benefits. Hence, new assessments should be made, taking into consideration the dedications of appellants. When this is done, it will doubtless demand an entire reapportionment between the properties found to be benefited.

The judgment is reversed with costs, and the cause remanded for further proceedings.

Reversed.

53 TUESDAY, February 25th, A. D. 1913.

January Term, 1913.

No. 2468.

LYNCHBURG INVESTMENT CORPORATION and HOLMES CENTRAL REALTY CORPORATION, Appellants,

vs.

CUNO H. RUDOLPH, JOHN A. JOHNSTON, and WILLIAM V. JUDSON, Commissioners of the District of Columbia.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia and was argued by counsel. On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said Supreme Court, in this cause, be, and the same is hereby, reversed with costs;

and that this cause be, and the same is hereby, remanded to the said Supreme Court for further proceedings.

Per MR. JUSTICE VAN ORSDEL,
February 25, 1913.

54 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 53 inclusive contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Lynchburg Investment Corporation and Holmes Central Realty Corporation, Appellants, vs. Cuno H. Rudolph, John A. Johnston and William V. Judson, Commissioners of the District of Columbia, No. 2468, April Term, 1913, as the same remain upon the files and records of said Court of Appeals:

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 21st day of April, A. D. 1913.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
*Clerk of the Court of Appeals of the District of Columbia.*

55 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Appeals of the District of Columbia, Greeting:

Being informed that there is now pending before you a suit in which Lynchburg Investment Corporation and Holmes Central Realty Corporation are appellants, and Cuno H. Rudolph, John A. Johnston, and William V. Judson, Commissioners of the District of Columbia, are appellees, No. 2468, which suit was removed into the said Court of Appeals by virtue of an appeal from the Supreme Court of the District of Columbia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Appeals and removed into the
56 Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the second day of June, in the year of our Lord one thousand nine hundred and thirteen.

JAMES H. McKENNEY,
*Clerk of the Supreme Court of the United States.*

57 [Endorsed:] No. 2468. File No. 23,668. Supreme Court of the United States, No. 1093, October Term, 1912. Cuno H. Rudolph et al., Commissioners, D. C., vs. Lynchburg Investment Corporation et al. Writ of Certiorari. Court of Appeals, District of Columbia. Filed Jun- 3, 1913. Henry W. Hodges, Clerk.

58 In the Court of Appeals of the District of Columbia.

No. 2468.

LYNCHBURG INVESTMENT CORPORATION and HOLMES CENTRAL REALTY CORPORATION, Appellants,

vs.

CUNO H. RUDOLPH, JOHN A. JOHNSTON, and WILLIAM V. JUDSON, Commissioners of the District of Columbia.

It is hereby stipulated by and between the respective parties hereto that the certified transcript of the record herein now on file in the Clerk's Office of the Supreme Court of the United States can be taken as a return to the writ of certiorari by the Supreme Court of the United States to this Court in the above entitled cause.

E. H. THOMAS,
J. F. SMITH,
*Att'ys for Appellee-, Comm'rs of D. of C.*
W. C. SULLIVAN,
JOSEPH W. COX,
*Attorneys for Appellants.*

(Endorsed:) No. 2468. Lynchburg Investment Corporation, et al., Appellants, vs. Cuno H. Rudolph, et al. Stipulation as to record on Return to Writ of Certiorari from Supreme Court U. S. Court of Appeals, District of Columbia. Filed Jun- 27, 1913. Henry W. Hodges, Clerk.

59 Court of Appeals of the District of Columbia, April Term, 1913.

No. 2468.

LYNCHBURG INVESTMENT CORPORATION and HOLMES CENTRAL REALTY CORPORATION, Appellants,

vs.

CUNO H. RUDOLPH, JOHN A. JOHNSTON, and WILLIAM V. JUDSON, Commissioners of the District of Columbia.

In obedience to the writ of certiorari filed in this cause and returned herewith, I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, hereby certify the foregoing to be a true copy of the stipulation of counsel filed herein agreeing that the

certified copy of the transcript of record now on file in the Supreme Court of the United States shall constitute the return of the clerk of the Court of Appeals to said writ of certiorari.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 27th day of June, A. D. 1913.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
*Clerk of the Court of Appeals of the District of Columbia.*

[Endorsed:] 536-13/23668. No. —. Court of Appeals of the District of Columbia.

60 [Endorsed:] File No. 23,668. Supreme Court U. S., October term, 1913. Term No. 536. Cuno H. Rudolph et al., Commissioners, D. C., Petitioners, vs. Lynchburg Investment Corporation et al. Writ of certiorari and return. Filed July 3, 1913.

FILED.
MAY 2 1913
JAMES H. McKENNEY
Clerk

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 1033. 163

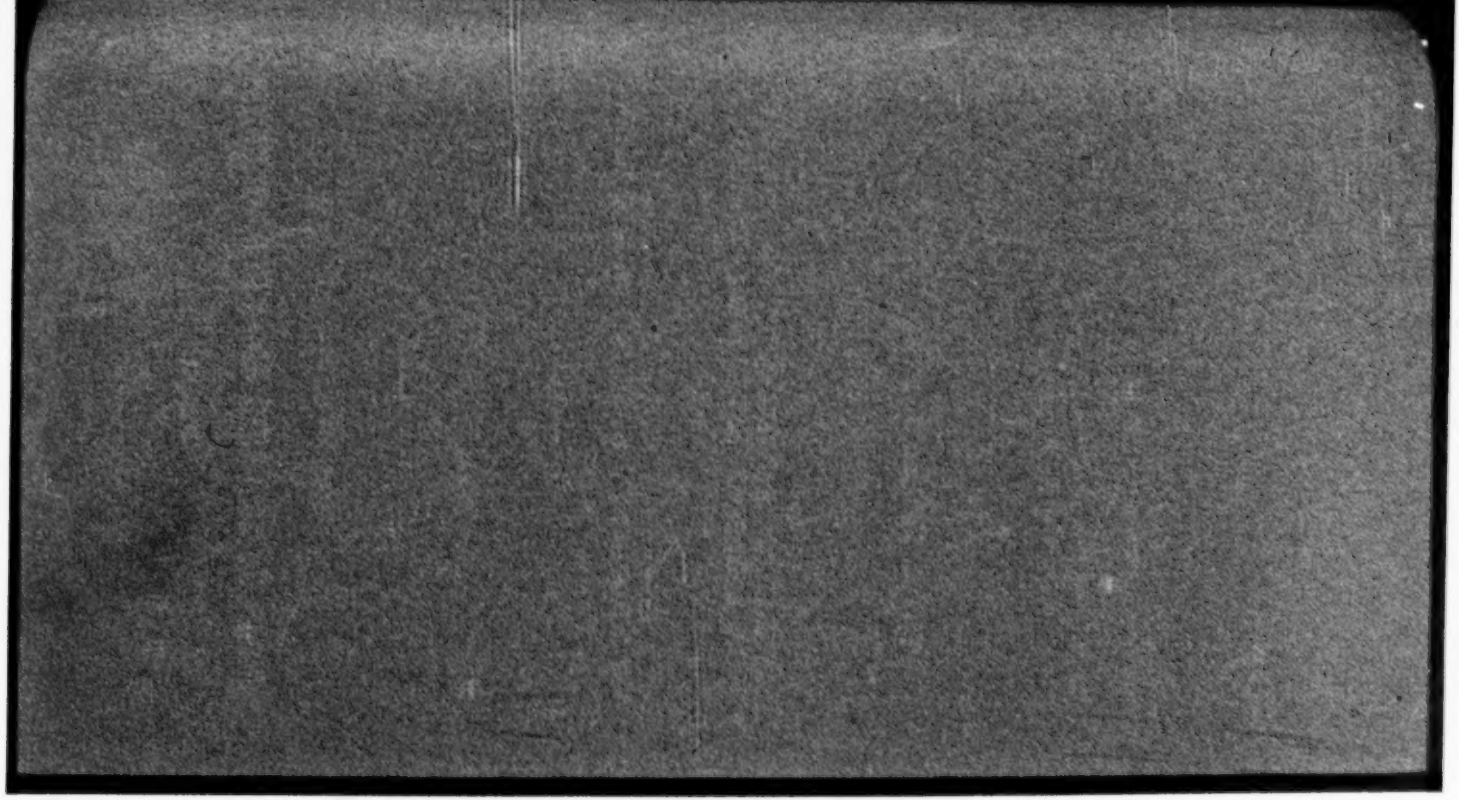
CUNO H. RUDOLPH, JOHN A. JOHNSTON, AND CHESTER HARDING, PETITIONERS,

vs.

LYNCHBURG INVESTMENT CORPORATION AND HOLMES CENTRAL REALTY CORPORATION, RESPONDENTS.

## PETITION FOR WRIT OF CERTIORARI.

EDWARD H. THOMAS,
*Corporation Counsel, D. C.,*
JAMES FRANCIS SMITH,
*Assistant Corporation Counsel,*
*Attorneys for Petitioners.*



IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

---

## No.

---

CUNO H. RUDOLPH, JOHN A. JOHNSTON, AND CHESTER HARDING, PETITIONERS,

*vs.*

LYNCHBURG INVESTMENT CORPORATION AND HOLMES CENTRAL REALTY CORPORATION, RESPONDENTS.

---

## PETITION.

*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioners, Cuno H. Rudolph, John A. Johnston, and Chester Harding, Commissioners of the District of Columbia, respectfully represent:

That under the authority and direction of a special act of Congress approved June 30, 1911, entitled "An act to authorize the extension and widening of Colorado avenue northwest from Longfellow street to 16th street, and of Kennedy street northwest, through lot numbered 800, square 2718" (37 Stat., 1), they instituted condemnation proceed-

ings in accordance with the provisions of sections 491*a* to 491*n*, inclusive, of the Code of Law for the District of Columbia, for the extension of the streets contemplated by the aforesaid act of Congress.

Section 491*c* of the Code provides as follows:

> "The court shall cause public notice of not less than twenty days to be given of the institution of such proceeding, by advertisement in three daily newspapers published in the District of Columbia, which notice shall warn and require all persons having any interest in the proceeding to appear in court at a date to be named in said notice, and to continue in attendance until the court shall have made its final order ratifying and confirming the award of damages, and the assessment of benefits by the jury herein provided for; and in addition to such public notice, said court shall cause a copy of said notice to be served by the United States Marshal for the District of Columbia, or his deputies, upon such owners of the land to be condemned as can be found by said marshal or his deputies, within the District of Columbia, and upon the tenants and occupants of the same."

A notice and order of publication embodying these requirements was issued by the Supreme Court of the District of Columbia, holding a District Court, on the 28th day of November, 1911 (R., 7), which notice warned and commanded all persons interested to appear in court on or before the 9th day of January, A. D. 1912, at 10 o'clock a. m., and further provided that a copy of the notice and order be published once in the Washington Law Reporter and on six secular days in the Washington Evening Star, the Washington Herald and the Washington Post, commencing at least twenty days before the 9th day of January, 1912.

The notices were duly published as ordered and copies were personally served upon a number of property owners, but not upon the respondents, neither of them being the owner of any of the land to be condemned. The Holmes Central Realty Company, one of the respondents, however, participated at the hearing of the case before the jury.

The proceedings were duly prosecuted and resulted in the verdict set out in the record (pp. 16-28), in which various parcels of land owned by the respondents were assessed for special benefits.

After the return of the verdict, objections were filed by the Lynchburg Investment Corporation, on the ground that the notice by publication did not satisfy the requirements of the law, and by the Holmes Realty Corporation, upon the ground that the verdict was unjust and unreasonable, because the jury did not take dedications of land into consideration, in assessing benefits, as required by law. Other grounds were assigned, but those stated only are pertinent to this hearing.

The court overruled the objections and confirmed the verdict.

The respondents appealed to the Court of Appeals of the District of Columbia, and that court reversed the judgment of the lower court, on the ground that the notice as published did not satisfy the requirements of the law, construing the words "public notice of not less than twenty days by advertisement in three daily newspapers published in the District of Columbia" **as meaning publication in three daily newspapers consecutively for twenty days prior to the return day, and held that "the failure of the court below to establish its jurisdiction by proper notice against appellants is fatal and renders the whole proceeding void and of no effect."**

The mandate of the Court of Appeals directs the vacation in its entirety, both as to awards and assessments, of the verdict returned by the jury. This notwithstanding the fact that only two of the parties interested objected or appealed and that one of those was present and participated at the hearing.

This decision is of great importance for the following reasons:

It virtually invalidates unpaid special assessments aggregating many hundreds of thousands of dollars.

It affects the titles of the District of Columbia, to hundreds of parcels of land in the District of Columbia, the awards for which have not been accepted by the owners.

It will necessitate an average cost for advertising in each street extension case of between six and eight hundred dollars, thereby increasing the burden of assessment.

It will result in throwing out of court absolutely a number of pending street extension cases, including the present case, where a time limit is fixed by the statute for the institution of the proceedings, under a ruling of the Supreme Court of the District of Columbia that the issuance of the notice, not the filing of the petition, is the commencement of the suit.

All of the awards except one in the present case have been paid and the property in part taken possession of and improved as a street. Many of the assessments have also been paid.

A further collateral effect of this decision will be to invalidate United States Marshal's sales of land under section 1035 of the Code, a statutory provision for notice by publication substantially similar to that in the case at bar. Under a practice settled for many years, marshal's sales are never advertised more than four times.

The advertisement in the present case follows a settled practice of thirteen years, ever since the present form of statutory provision for notice has been used.

THIS DRASTIC DECISION IS UNSUPPORTED BY A SINGLE AUTHORITY CONSTRUING THE STATUTORY PROVISIONS FOR NOTICE BY PUBLICATION IN CONDEMNATION OR SPECIAL ASSESSMENT STATUTES.

IT IS DIRECTLY CONTRARY TO ALL REPORTED DECISIONS CONSTRUING PROVISIONS FOR NOTICE BY PUBLICATION IN SUCH STATUTES. ABOUT FIFTEEN SUCH CASES ARE CITED AND EXTRACTS THEREFROM QUOTED IN THE APPENDIX.

IT IS CONTRARY TO THE STATEMENT OF THE PROPOSITION OF EVERY TEXT WRITER WHO HAS DISCUSSED THE SUBJECT.

NOT ONE OF THE CASES CITED IN THE OPINION AS SUSTAINING IT INVOLVES THE PROVISION FOR NOTICE BY PUBLICATION IN AN EMINENT DOMAIN OR SPECIAL ASSESSMENT STATUTE.

THE CASES CITED IN THE OPINION ARE SUITS IN EQUITY TO SET ASIDE FORECLOSURE SALES OF LAND UNDER CIRCUMSTANCES SUGGESTING FRAUD, WHERE THE PURCHASE PRICE WAS GROSSLY INADEQUATE.

THEY ARE CASES IN WHICH THE GUIDING PRINCIPLE WAS THAT EQUITY ABHORS A FORFEITURE. THE PURPOSE OF THE ADVERTISEMENT IN THOSE CASES WAS TO ATTRACT NUMBERS OF BIDDERS TO SALES SO AS TO INCREASE THE PURCHASE PRICE, AND THE REASONING UNDERLYING THE DECISIONS DOES NOT APPLY IN THE PRESENT CASE.

THE CASES SUPPORTING THE CONTENTION OF YOUR PETITIONERS, AND THE CASES CITED IN THE OPINION IN SUPPORT OF THE DECISION OF THE COURT, ARE DISCUSSED IN AN APPENDIX. THERE ARE BUT SIX CASES IN THE LATTER CLASS, AND SEVERAL OF THOSE WERE LATER OVERRULED BY COURTS OF THE SAME STATES.

Another ground of reversal assigned is the failure of the trial court to instruct the jury to take dedications into consideration. The record shows that the party most affected by this question was present and participated at the hearing before the jury. No evidence was offered as to any dedication, and no instructions asked in respect thereof. The question was properly addressed to the trial court on a motion to set aside the verdict as being unjust and unreasonable. The trial court found that there was no substantial merit in the contention. It is submitted that the Court of Appeals had no jurisdiction to review this ruling.

Your petitioners believe that the aforesaid decree of the Court of Appeals of the District of Columbia is erroneous, and that this honorable court should require the said cause to be certified to it for its review and determination, in con-

formity with section 251 of the act approved March 3rd, 1911, entitled an act to codify, revise and amend the laws relating to the judiciary, in such case made and provided.

Wherefore your petitioners pray that the writ of certiorari may issue out of and under the hand and seal of this court, directed to the Court of Appeals of the District of Columbia, demanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Court of Appeals in said cause therein entitled No. 2468, "Lynchburg Investment Corporation and Holmes Central Realty Corporation, appellants, *vs.* Cuno H. Rudolph, John A. Johnston, and William V. Judson, Commissioners of the District of Columbia", to the end that said cause may be reviewed and determined by this court, and that the said decree of the said Court of Appeals in said cause, and every part thereof, may be reversed by this honorable court.

CUNO H. RUDOLPH,
JOHN A. JOHNSTON,
CHESTER HARDING,
*Commissioners of the District of Columbia, Petitioners Herein.*

EDWARD H. THOMAS,
*Corporation Counsel;*
JAMES FRANCIS SMITH,
*Assistant,*
*Attorneys for Petitioners.*

## APPENDIX.

### I.

*Authorities Which Support the Contention of the Petitioners.*

Paige and Jones on "Taxation by Assessment", section 763, thus states the general doctrine on this proposition:

> "It is frequently provided by statute that so many 'days' notice' must be published. It is generally held that this does not mean publication for each day for the specified number of days, but that such a statute is satisfied by a single publication for the requisite number of days before the step in the assessment proceedings for which notice is to be given. Thus, a statute requiring 'at least sixty days' notice' has been held to mean that the period of sixty days must elapse after the publication of the notice before the performance of the act of which notice is to be given. Accordingly, giving notice once a week for nine consecutive weeks was held to be a compliance with the statute."
>
> See also Lewis on Eminent Domain, section 579 (3rd Ed., bot. p. 1026).

In Aldis *vs.* South Park Commissioners (171 Ill., 424), a case involving the validity of assessments for the improvement of the street, the court said, page 432:

> "It is next contended that the notice of publication for confirmation was insufficient to confer jurisdiction on the court to enter judgment. This position is predicated on the fact that the notice found on file as shown by the certificate of publication attached to the notice, was published but once in the daily newspaper, and it is claimed the statute required the notice to be published ten days in succession before the day of confirmation. The statute provides that the said

> commissioners shall give 'at least ten days' notice of the application' for confirmation, 'which said notice shall be published in one or more newspapers published in the county at least ten days before the time named for such application.' *Unless no other and different authority from that found in the section of the statute is to be incorporated into it, we think the obvious meaning of the section is that the notice shall be published once and that ten days before the time named for the application. The legislature, in the enactment of the statute, no doubt understood the difference between ten days' notice and ten days' successive notice, and if it had been intended to require ten successive days' notice, language indicating that intention would have been incorporated in the section before it was adopted.*" (Italics ours.)

The above was cited with approval in Royal Insurance Company *vs.* South Park Commissioners, 175 Ill., 491.

In Central Savings Bank of Baltimore *vs.* Mayor and City Council of Baltimore (71 Md., 515), where the commissioners for opening streets had made their assessments for benefits and damages for the extension and widening of Douglass street, Baltimore, and a motion was made to quash the proceedings on the ground of insufficiency of the notice, the court said, page 518:

> "The act of assembly expressly requires that before any ordinance shall be passed for opening, extending or widening a street in the city of Baltimore, sixty days' notice of an application for its passage shall be given in two of the daily newspapers of the city. The power to pass the ordinance depends upon the performance of this condition. In this case the first publication of the notice was more than sixty days before the passage of the ordinance. The statute does not direct that the notice shall be published any specified number of times; it merely requires that it shall be given. *A notice may be given once, twice or a dozen times, and it may be repeated at distant intervals; but it is difficult to infer that it must be repeated, from the mere requirement that it shall be*

*given. The statute prescribes a limitation under which the legislative power of the mayor and city council is to be exercised. If it were possible for us to change the terms of this limitation we should be met with a very serious difficulty, when we attempted to define the extent to which we should carry the change. Should we say that the notice should be published ten, twenty or thirty times, or should we say that the number of publications should be determined by the judgment which we might form of the exigencies of the particular case? * * * In the present case the notice was published a number of times; but the interval between the last publication and the passage of the ordinance was less than sixty days. Repetitions of the notice were reasonable, as they gave it greater publicity.*" (Italics ours.)

In Philadelphia, Wilmington and Baltimore R. R. Co. *vs.* Shipley (72 Md., 90), an action to recover an assessment, the declaration alleging "that the ten days' notice required by said act was duly given by inserting the same, both in the Maryland Journal, a newspaper published a Towsontown, and in the Baltimore Sun, on the 4th day of February, 1888, the defense was that the declaration did not show compliance with the provisions of the statute in regard to giving notices. The court said, page 92:

"Notices required to be given by the act under which this suit is brought are three in number: First, 'the examiner shall give at least ten days' notice by publication in one or more newspapers published in Baltimore county, and one newspaper of general circulation published in Baltimore city', that application has been made to open said street. * * * We think that when the declaration is tested by this statutory provision, it clearly appears by its allegations that the plaintiff did all that he was required to do in giving notices.

"In Baltimore *vs.* Little Sisters of the Poor, 56 Md., 405, the court in construing a statute requiring that 'at least sixty days' notice shall be given' said: 'It is clear that the statute does not require a daily

publication for sixty days in two newspapers, nor does it specify any number of times for the publication.' * * *

"And in this case we think the one publication in each of the two newspapers mentioned was enough to gratify the statutory requirement."

In Mayor and City Council of Baltimore *vs.* The Little Sisters of the Poor (56 Md., 400), which was a bill for injunction to restrain the collection of an assessment of benefits for the opening of McKim street, on the ground that the assessment was invalid for the want of sufficient preliminary notice required by law, which provided that "at least sixty days' notice shall be given of any application for the passage of such ordinance in at least two of the daily newspapers in the said city," the court held, page 406:

*"It is clear that the statute does not require a daily publication for sixty days in two newspapers, nor does it specify any number of times for the publication. According to its true construction, it requires that the notice shall be published in two of the daily newspapers of the city, and that a period of sixty days shall elapse after the publication of the notice, before any such ordinance shall be passed. Such has been the construction and uniform practice ever since the act of* 1838, *ch.* 236, *was passed containing the same provision now embodied in the local Code.* (Italics ours.)

"In Bouldin's case, 23 Md., 328, in which the question of the sufficiency of the notice was fully discussed, the record shows that it had been published four times in each of two daily newspapers. It was not suggested by the counsel for the appellee, in that case, that such a publication was not sufficient, provided it had been made at least sixty days before the ordinance was passed. The point was therefore not distinctly referred to by the court; but it was held that the publication of the notice was sufficient.

"The cases of White *vs.* Malcolm, 15 Md., 529, and Johnson *vs.* Dorsey, 7 Gill., 269, 286, in which analo-

gous questions arose, are strong authorities in support of the position taken by the appellant.

"In our opinion, the publication of the notice in this case was a sufficient compliance with the provisions of the Code."

In Harrison *vs.* Newman, 71 Kansas, 325, the Court says:

"Section 160 provides that when a city appropriates private property for certain stated purposes (including the opening of an alley) the appraisers appointed shall ascertain the value of the land taken, and the damages to other property, and apportion the total in accordance with their judgment * * * and that they shall at least give three days' notice in the official city paper of the time and place of their meeting.

"The only notice in that case was by publication made in one issue of a daily paper nine days before the meeting of the appraisers. The plaintiff claims that this was not a compliance with the requirements of section 160, and argues that 'three days' notice in the official paper means three publications on three separate days in that paper.' We do not think this is a correct interpretation. A three days' notice of a meeting is a notice given three days before the meeting is to be held. One publication in a daily paper is notice, and if it is made three days in advance of the time set it is three days' notice. (P. W. & B. R. R. Co. *vs.* Shipley, 72 Md., 90.) Similar phrases are of frequent occurrence in the statutes in such connection as to admit of no other construction. Where a continuous publication is intended this is indicated by the requirement that it shall be 'for a stated time, or by some equivalent expression.'"

In McGilvery *vs.* The City of Lewiston (13 Idaho, 338), a recent case, involving the validity of a special assessment for sewers, the syllabus, paragraph 8, page 339, reads:

"Where the statute provides for the giving 'of twenty days' notice' by publication in some newspaper, but does not specify any number of issues of the newspaper in which the notice shall be published,

> it is a sufficient compliance with the statute if the notice is published in one issue of the paper, and that publication occurs twenty days prior to the date of the meeting or other action of which the publication purports to give notice."

In Drainage District *vs.* Campbell (154 Mo., 151), the court, after stating the general rule that the provisions of the law in condemnation cases must be strictly complied with, in response to a contention that the notice was not published for fifteen days before the time at which the parties were notified to appear before the court, under a statute which authorized commissioners to proceed "on giving fifteen days' notice," said:

> "The time specified in the notice at which defendants were notified to appear before the judge was August 24, 1896, while its first insertion in the newspaper was on August 7, 1896, and thereafter weekly until the 21st of that month, when it was published for the last time. There was, therefore, seventeen days' notice, including the day of its first insertion in the paper, and excluding the 24th, the day upon which the application was heard. It was only necessary that fifteen days intervene between the first application and the time fixed for hearing the application, while, as has been said, there were seventeen days."

The above decision is significant because one of the authorities mainly relied upon by the respondents and cited in the opinion is Stine *vs.* Wilkson, 10 Mo., 75.

Following is another Missouri case modifying Stine *vs.* Wilkson:

> "German Bank *vs.* Stumpf, 73 Mo., 311, 314. This was an action of ejectment respecting property sold under a deed of trust, the allegation being that the notice of sale did not satisfy the requirements of the law.
>
> "The COURT: In regard to the notice, we are of opinion that the omission to publish it on the three

> days named does not render the sale void. * * * It is unnecessary, however, to make any conjectures upon the subject. When thirty days' notice is required, thirty days should, of course, intervene between the first publication and the day of sale; and although it may be customary and competent to continue the notice in every issue of the paper from its first insertion to the day of sale, yet it has been expressly decided that thirty days' notice in a daily paper does not mean thirty days' daily notice in such paper. *White vs. Malcolm*, 15 Mo., 543; *Johnson vs. Dorsey*, 7 Gill., 286; *Leffler vs. Armstrong*, 4 Iowa, 482. We think, however, that, where the notice has not appeared in every issue of the paper from its first insertion to the date of sale, and the omission to make continuous publication therefore is of such a character or is attended by such circumstances as to mislead the public and work an injury to the party whose property is sold, the same may be set aside. *Stine vs. Wilkson*, 10 Mo., 96."

In Muskingum Valley Turnpike Company *vs.* Ward, 13 Ohio, 120, concerning the provision of the statute requiring "at least sixty days' notice" to be given of the time and place of payment of stock instalments, the court said:

> "The third ground for a new trial is that the notice was not published continuously for sixty days. This position stands upon the hypothesis that 'at least sixty days' notice' is equivalent to 'notice for and during sixty days.' The words are, however, not equivalent. Notice published once sixty days or more before the time of payment is all that the statute requires. *We are not left at liberty to imagine or suppose in this case that one thing is expressed and another intended, because whenever the legislature have designed that continuous notice shall be given they have used explicit terms. Had a continuous notice been intended in this class of cases we should have found words more appropriate to convey that meaning, such as 'notice by publication at least sixty days prior to the day of payment, which notice shall be published daily, tri-weekly or weekly to the day of*

> *payment', or 'which notice shall be continued for eight consecutive weeks prior to the day of payment.'* The manifest object of requiring sixty days' notice was to give the stockholders reasonable time to prepare funds to meet the demands made upon them. The notice must be, from the power of the words used in the statute, complete at least sixty days before the day of payment. It could not be thus complete if, in order to perfect it, the necessity existed of renewing it each week during the sixty days." (Italics ours.)

In Andrews *vs.* Ohio & Mississippi Railway Co., 14 Ind., 169, a case involving the statutory provision as to notice for the payment of installments of stock, the court said:

> "Two objections were made which we will notice: First, that the charter authorized calls by giving sixty days' notice in some newspaper, etc.; that this was inserted at a single time, whereas it should have been continuously. * * *
>
> "Was the notice proved sufficient? We are of opinion that it was? The notice was not required to be published in different newspapers or issues of a newspaper. The notice began to operate from the time it was given. It was not by the statute required to be renewed, as in some other instances."

In Jenkins, Assignee, *vs.* Pierce, 98 Ill., 646, attacking the validity of a deed of trust sale for lack of notice, the court, in its opinion, said:

> "The mortgage provides that, in default of payment, 'Prather, his heirs, executors, administrators or assigns, after publishing a notice in a newspaper printed in the city of Chicago thirty days before the sale, may make sale of said premises.' The notice was published in a newspaper printed in the city of Chicago more than thirty days before the day of sale, and as to this there is no controversy. It was held in *Weld vs. Rees*, 48 Ill., 428, that, under a power containing identically the same language, but one publication was necessary. The notice published was, therefore, sufficient."

In *In re* Bassford, 50 New York Reports, 510, 511, the court concurred in the opinion of the judge at general term respecting the construction of the statutory provision for notice of an improvement for which an assessment was levied. The opinion concurred in is printed as a foot-note, and is in part as follows:

> "The design was to apprise the tax-payers in the manner pointed out in the statute of any contemplated improvement so that by remonstrance or suggestions the same might be modified or prevented. It is reasonable to suppose that such notice would be more available by waiting two days after its publication than by requiring two publications within twenty-four hours previous to the time of acting.
>
> "There was nothing in the Douglass case that decided this question, and I see no reason for changing the views on this point. All laws requiring a party to have a given number of days' notice have been construed to mean only notice served so many days before the act can be done. * * * The object of the law was to provide notice to the persons interested that such a proposition was pending before them."

In Weld *vs.* Rees, 48 Ill., 428, involving the validity of a sale under a deed of trust under the statute providing for such sale "after publishing notice in a newspaper published in the city of Chicago ten days before the day of such sale," the court said:

> "It will be observed that the language does not in terms require notice to be published by ten daily insertions or a notice for ten days, the first insertion being ten days before the sale. If it had, then there might be some question as to the sufficiency of the notice. But the language is, 'after publishing a notice in a newspaper published in the city of Chicago ten days before the day of such sale.' Had there been but one insertion, and that on the first day of the month, it would have been a notice in a newspaper published ten days before the 13th of the

> month. The language, in terms, does not require, nor does it import, that the publication shall be a continuous one. * * * The language employed in this case would seem to have been employed to exclude the idea that the notice should be continuous, as it has no terms which would imply successive or continuous publication."

The following excerpt from the opinion of the court in Wight *vs.* Davidson, 181 U. S., 371, is pertinent:

> "It is also established by those authorities that, in proceedings of this nature, notice by publication is sufficient; and it accordingly follows that the order of publication, in the newspapers named, by the Supreme Court of the District gave due notice of the filing of the petition and an opportunity to all persons interested to show cause, if any they had, why the prayer of the petition should not be granted. Such notice also must be held to have operated as a notice to all concerned of the pending appointment of a jury, and that proceedings under the act of Congress would subsequently be had. This gave an opportunity for interested parties to attend the meetings of the jury, to adduce evidence, and be heard by counsel. The return of the marshal shows that some, at least, of the property owners appeared before the jury, produced witnesses, and were heard by counsel. If the appellees did not avail themselves of these opportunities, the court and jury, proceeding according to law, were not to blame."

II.

A brief reference to the cases cited in the opinion is submitted.

Stine *vs.* Wilkson, 10 Mo., 75, was a suit to set aside a foreclosure sale at a grossly inadequate price after an obscure advertisement suggesting fraud.

If this case is cited to sustain the proposition that a statutory requirement of a given number of days' notice means that number of successive publications, it is overruled

in the later Missouri cases—German Bank *vs.* Stumpf, 73 Mo., 311; Drainage District *vs* Campbell, 154 Mo., 151., heretofore quoted.

Washington *vs.* Bassett *et al.*, 15 R. I., 563, relies upon Stine *vs.* Wilkson, which was afterward overruled.

Allen *vs.* Kerr, 13 Lea (Tenn.), 256, was a motion to retax costs in a foreclosure case in which the allowance of cost for twenty consecutive days' advertising was contested. The court held that the statute in that case allowed the court discretion as to the number of insertions, and the court having ordered the sale "after having given twenty days' notice," the cost of twenty successive publications was not an improper charge.

Armstrong *et al. vs.* Scott, 3 Greene (Iowa), 433, and Leffler *vs.* Armstrong, 4 Iowa, 487, held that a provision requiring "thirty days' public notice in some newspaper printed in Burlington" was satisfied by publications once a week in the weekly paper commencing thirty days before the day of sale. There was no indication in either of these cases that no daily paper was available, as intimated by the court in its opinion.

Land Co. *vs.* Loan & Trust Co., 52 Neb., 410, decides that a provision requiring "publication at least thirty days before the sale" is satisfied if the notice is published in five consecutive issues of a weekly newspaper.

These decisions, it is submitted, do not support the construction adopted by the Court of Appeals.

Delogny *vs.* Smith, 3 La., 418-423, another case of enforced alienation, held that a provision for sale after three months' advertisement meant that the sale should be had in each of the three months preceding sale.

Boswell's Lessee *vs.* Otis *et al.*, 9 How., 336-350, is not at all in point. That case concerned the sale of certain land belonging to a non-resident of the State of Ohio brought into court by service by publication, but the particular land sold was not involved in the case, and it was held in a collateral

attack on the sale that the court had acquired jurisdiction only with respect to the land in suit.

The above are all of the cases cited in the opinion of the Court of Appeals on the question of publication.

EDWARD H. THOMAS,
*Corporation Counsel;*
JAMES FRANCIS SMITH,
*Assistant,*
*Attorneys for Petitioners.*

IN THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, APRIL TERM, 1913.

No. 2468.

CUNO H. RUDOLPH, JOHN A. JOHNSTON, and CHESTER HARDING, *Petitioners,*

vs.

LYNCHBURG INVESTMENT CORPORATION and HOLMES CENTRAL REALTY CORPORATION, *Respondents.*

The appellants are hereby notified that the appellees will, on the 5th day of May, 1913, submit their petition for certiorari and a copy of the entire record in this case at the opening of the court on that day, or as soon thereafter as counsel can be heard, to the Supreme Court of the United States in its court-room, at the United States Capitol, in the city of Washington, in the District of Columbia, a copy of which petition for certiorari and authorities in support thereof are herewith delivered to you.

15

EDWARD H. THOMAS,
JAMES FRANCIS SMITH,
*Attorneys for Petitioners.*

The foregoing notice is hereby accepted and delivery of copy thereof and of petition for writ of certiorari and authorities in support thereof is hereby acknowledged, this 29th day of April, A. D. 1913.

W. C. SULLIVAN,
LECKIE, FULTON & COX,
*Attorneys for Respondents.*

Office Supreme Court, U. S.
FILED
JAN 27 1913
JAMES D. MAHER
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

---

## No. 163.

---

CUNO H. RUDOLPH, JOHN A. JOHNSTON, AND CHESTER HARDING, PETITIONERS,

*vs.*

LYNCHBURG INVESTMENT CORPORATION AND HOLMES CENTRAL REALTY CORPORATION, RESPONDENTS.

---

## BRIEF FOR PETITIONERS.

---

CONRAD H. SYME,
*Corporation Counsel, D. C.;*
JAMES FRANCIS SMITH,
*Assistant Corporation Counsel,*
*Attorneys for Petitioners.*

INDEX.


| | Page |
|---|---|
| **STATEMENT OF CASE** | 1-5 |
| **ASSIGNMENT OF ERRORS** | 5 |
| **ARGUMENT** | 5-26 |
| **I. The Notice as Published Satisfied the Requirements of the Law** | 5-17 |
| Authorities pro | 6-15 |
| Authorities contra | 15-17 |
| **II. Dedications** | 17-20 |
| No instruction requested nor exception taken. Therefore should not be reviewed. | 17 |
| Met. R. R. Co. vs. D. C., 195 U. S., 332 | 17 |
| Reasonableness of verdict a question for trial judge and not reviewable. | |
| Col. Heights Realty Co. vs. McFarland, 217 U. S., 547, 560 | 18 |
| No injustice is shown | 18-20 |
| **III. The Burden of Proof** | 20-24 |
| Not upon the petitioners. | |
| Bauman vs. Ross, 167 U. S., 548 | 20 |
| Wight vs. Davidson, 181 U. S., 371 | 20 |
| Henderson vs. Macfarland, 33 Apps. D. C., 317 | 21 |
| Mayor, etc., of Baltimore vs. Smith & Schwartz Co., 80 Md., 458 | 22 |
| **IV. The vacation of verdict in toto notwithstanding two parties only excepting was error** | 25 |
| Briscoe vs. MacFarland, 32 App. D. C., 167 | 25 |
| Section 491h of D. C. Code | 25 |
| Conclusion | 26 |


TABLE OF CASES.


| | |
|---|---|
| Act of June 30, 1911 | 2 |
| Aldis vs. South Park Commissioners, 171 Ill., 424 | 6 |
| Allen vs. Kerr, 13 Lea (Tenn.), 256 | 16 |
| Andrews vs. Ohio & Mississippi Railway Co., 14 Ind., 169 | 13 |
| Armstrong et al. vs. Scott, 3 Greene (Iowa), 433 | 16 |
| Bassford, In re, 50 N. Y. Reports, 510, 511 | 14 |
| Bauman vs. Ross 167 U. S. 548 | 20-21 |
| Boswell's Lessee vs. Otis et al., 9 How. 336, 350 | 16 |

| | Page |
|---|---|
| Bouldin's Case, 23 Md., 328 | 9 |
| Briscoe vs. Commissioners, 221 U. S., 547 | 23 |
| Central Savings Bank vs. Mayor, etc., of Baltimore, 71 Md., 515. | 7 |
| Columbia Heights Realty Co. vs. McFarland, 217 U. S., 547, 560. | 18–23 |
| Dologuy vs. Smith, 3 La., 418, 423 | 16 |
| District of Columbia vs. Cemetery, 5th Apps. D. C., 497 | 18 |
| Drainage District vs. Campbell 154 Mo., 151 | 11–16 |
| German Bank vs. Stumpf, 73 Mo., 311, 314 | 11–16 |
| Harrison vs. Newman, 71 Kans., 325 | 10 |
| Henderson vs. Macfarland, 33 D. C. Apps., 317 | 21 |
| Jenkins, Assignee, vs. Pierce, 98 Ill., 646 | 13 |
| Johnson vs. Dorsey, 7 Gill., 269, 286 | 10 |
| Land Co. vs. Loan & Trust Co., 52 Neb., 410 | 16 |
| Leffler vs. Armstrong, 4 Iowa, 487 | 12–16 |
| Lewis on Eminent Domain, 579 | 6 |
| Mayor, etc., of Baltimore vs. Little Sisters of the Poor, 56 Md., 400 | 9 |
| Mayor, etc., of Baltimore vs. The Smith & Scuwartz Brick Co., 80 Md., 458 | 22 |
| McGilvery vs. City of Lewiston, 13 Idaho, 338 | 10 |
| Metropolitan Ry. Co. vs. D. C., 195 U. S., 322, 332 | 17 |
| Muskingum Valley Turnpike Co. vs. Ward, 13 Ohio, 120 | 12 |
| Paige & Jones, "Taxation by Assessment," 763 | 6 |
| P., W. & B. R. R. Co. vs. Shipley, 71 Md., 515 | 8 |
| Royal Ins. Co. vs. South Park Commissioners, 175 Ill., 491 | 7 |
| Stine vs. Wilkson, 10 Mo., 75 | 11–15 |
| Washington vs. Bassett, 15 R. I., 563 | 16 |
| Weld vs. Rees, 48 Ill., 428 | 14 |
| Wight vs. Davidson, 181 U. S., 371 | 15–20 |
| White vs. Malcolm, 15 Md., 529 | 10 |

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912.

---

## No. 163.

---

CUNO H. RUDOLPH, JOHN A. JOHNSTON, AND CHESTER HARDING, PETITIONERS,

*vs.*

LYNCHBURG INVESTMENT CORPORATION AND HOLMES CENTRAL REALTY CORPORATION, RESPONDENTS.

---

## BRIEF FOR PETITIONERS.

---

### Statement of the Case.

Under the authority and direction of a special act of Congress approved June 30, 1911, entitled "An act to authorize the extension and widening of Colorado avenue northwest from Longfellow street to Sixteenth street, and of Kennedy street northwest, through lot numbered 800, square 2718" (37 Stat., 1), the Commissioners of the District of Columbia instituted condemnation proceedings in accord-

ance with the provisions of sections 491*a* and 491*n*, inclusive, of the Code of Law for the District of Columbia for the extension of the streets contemplated by the aforesaid act of Congress.

Section 491*c* of the Code provides as follows:

> "The court shall cause public notice of not less than twenty days to be given of the institution of such proceedings, by advertisement in three daily newspapers published in the District of Columbia, which notice shall warn and require all persons having any interest in the proceeding to appear in court at a date to be named in said notice, and to continue in attendance until the court shall have made its final order ratifying and confirming the award of damages, and the assessment of benefits by the jury herein provided for; and in addition to such public notice, said court shall cause a copy of said notice to be served by the United States marshal for the District of Columbia, or his deputies, upon such owners of the land to be condemned as can be found by said marshal or his deputies, within the District of Columbia, and upon the tenants and occupants of the same."

A notice and order of publication issued from the Supreme Court of the District of Columbia, holding a district court, on the 28th day of November, 1911 (R., 7), which notice warned and commanded all persons interested to appear in court on or before the 9th day of January, A. D. 1912, at 10 o'clock a. m., and further provided that a copy of the notice and order be published once in the Washington Law Reporter and on six secular days in the Washington Evening Star, the Washington Herald, and the Washington Post, commencing at least twenty days before the 9th day of January, 1912.

The notices were duly published as ordered, and copies were personally served upon a number of property owners, but not upon the respondents, neither of them being the owner of any of the land to be condemned. The Holmes

Central Realty Company, one of the respondents, however, participated at the hearing of the case before the jury.

The proceedings were duly prosecuted and resulted in a verdict (R., 16-27) in which an aggregate of $34,139.37 was awarded for the land taken and an aggregate of $34,675.55 was assessed as benefits.

Of the latter an aggregate of $3,526.10 was assessed against the lands of the Holmes Realty Company and an aggregate of $3,741.00, covering 38 parcels of land, against the lands of the Lynchburg Investment Corporation.

Section 491*h* of the Code provides:

> "The said court shall hear and determine any objection or exceptions that may be filed to any verdict of the jury and shall have power to vacate and set any verdict aside in whole or in part, when satisfied that it is unjust or unreasonable, in which event the court shall cause a new jury of five experienced, judicious, disinterested men, * * *. *Provided*, That if vacated in part, the residue of the verdict as to the land condemned or assessed shall not be affected thereby.

Under the provisions of this section objections to this verdict were filed by the Lynchburg Investment Corporation on the grounds generally—

1. That the notice by publication was defective and insufficient in that publication on six secular days did not satisfy the provision of the law requiring "public notice of not less than twenty days."

2. That the court had failed to instruct the jury to take into consideration dedication of land which had been made by the said Lynchburg Investment Corporation.

3. Because the assessment of benefits against the Lynchburg Investment Corporation was excessive.

Objections to the verdict were filed by the Holmes Central Realty Corporation on the grounds—

1. That the assessment of benefits made against the Holmes Central Realty Corporation were excessive.

2. That the court had failed to instruct the jury to take into consideration dedications of land made by the said Holmes Central Corporation.

The court overruled the objections and confirmed the verdict. The respondents thereupon appealed to the Court of Appeals of the District of Columbia, and that court reversed the judgment of the lower court on the ground mainly that the notice as published did not satisfy the requirements of the law construing the words "public notice of not less than twenty days in three daily newspapers published in the District of Columbia" *as meaning publication in three daily newspapers in twenty consecutive daily issues of said papers immediately prior to the return date.*

And the court held that:

> *"The failure of the court below to establish its jurisdiction by proper notice against appellants is fatal and renders the whole proceeding void and of no effect* (R., 49).

The court further held that the failure of the court below to instruct the jury to take into consideration, in assessing benefits, dedications of lands made by the appellants was reversible error.

This decision affects the validity of a very large number of unpaid special assessments, and also the title of the District to many parcels of land, where parties were brought into court by publication similar to that in the present case, according to settled practice of many years' standing.

The case was brought to this court by writ of certiorari.

## Assignment of Errors.

1. The Court of Appeals of the District of Columbia erred in its construction of the provisions of the law respecting notice by publication.

2. The court erred in holding that the failure of the trial judge to instruct the jury to take into consideration the dedications of lands by the respondents was reversible error.

3. The court erred in holding that the trial judge erred in refusing the instruction that the burden of proof as to benefits was on the petitioners.

4. The court erred in holding that the verdict should be set aside in toto notwithstanding only two parties excepted and appealed.

## ARGUMENT.

### I.

### The Notice by Publication Satisfies the Requirements of the Law.

A decision which upsets settled practice and is of such far-reaching consequence should have the support at least of the weight of authority on the proposition involved.

No authority, it is believed, can be found construing the statutory provisions for notice by publication in condemnation or assessment proceedings which supports this drastic decision.

It is directly contrary to all reported decisions construing such provisions.

Seventeen of such cases are hereafter cited and extracts therefrom quoted.

The decision is contrary to the statement of the proposition of every text-writer who has discussed the subject.

The cases cited in the opinion of the court below in its support are suits in equity to set aside foreclosure sales of land under circumstances suggesting fraud where the purchase price was grossly inadequate.

They are cases in which the guiding principle was that equity abhors a forfeiture.

Following are some authorities:

*A. Supporting the contention petitioners.*

Paige and Jones on "Taxation by Assessment," section 763, thus states the general doctrine on this proposition:

> "It is frequently provided by statute that so many 'days' notice must be published. It is generally held that this does not mean publication for each day for the specified number of days, but that such a statute is satisfied by a single publication for the requisite number of days before the step in the assessment proceedings for which notice is to be given. Thus, a statute requiring 'at least sixty days' notice' has been held to mean that the period of sixty days must elapse after the publication of the notice before the performance of the act of which notice is to be given. Accordingly, giving notice once a week for nine consecutive weeks was held to be a compliance with the statute."
>
> See also Lewis on Eminent Domain, section 579 (3d ed., bot. p. 1026).

In Aldis *vs.* South Park Commissioners (171 Ill., 424), a case involving the validity of assessments for the improvement of a street, the court said, page 432

> "It is next contended that the notice of publication for confirmation was insufficient to confer jurisdiction on the court to enter judgment. This position is

predicated on the fact that the notice found on file as shown by the certificate of publication attached to the notice, was published but once in the daily newspaper, and it is claimed the statute required the notice to be published ten days in succession before the day of confirmation. The statute provides that the said commissioners shall give 'at least ten days' notice of the application' for confirmation, 'which said notice shall be published in one or more newspapers published in the county at least ten days before the time named for such application.' *Unless no other and different authority from that found in the section of the statute is to be incorporated into it, we think the obvious meaning of the section is that the notice shall be published once and that ten days before the time named for the application. The legislature, in the enactment of the statute, no doubt understood the difference between ten days' notice and ten days' successive notice, and if it had been intended to require ten successive days' notice, language indicating that intention would have been incorporated in the section before it was adopted.*" (Italics ours.)

The above was cited with approval in Royal Insurance Company *vs.* South Park Commissioners, 175 Ill., 491.

In Central Savings Bank of Baltimore *vs.* Mayor and City Council of Baltimore (71 Md., 515), where the commissioners for opening streets had made their assessments for benefits and damages for the extension and widening of Douglass street, Baltimore, and a motion was made to quash the proceedings on the ground of insufficiency of the notice, the court said, page 518:

"The act of assembly expressly requires that before any ordinance shall be passed for opening, extending or widening a street in the city of Baltimore, sixty days' notice of an application for its passage shall be given in two of the daily newspapers of the city. The power to pass the ordinance depends upon the performance of this condition. In this case the first publication of the notice was more than sixty days before the passage of the ordinance. The statute

> does not direct that the notice shall be published any specified number of times; it merely requires that it shall be given. *A notice may be given once, twice or a dozen times, and it may be repeated at distant intervals; but it is difficult to infer that it must be repeated, from the mere requirement that it shall be given. The statute prescribes a limitation under which the legislative power of the mayor and city council is to be exercised. If it were possible for us to change the terms of this limitation we should be met with a very serious difficulty, when we attempted to define the extent to which we should carry the change. Should we say that the notice should be published ten, twenty or thirty times, or should we say that the number of publications should be determined by the judgment which we might form of the exigencies of the particular case? * * * In the present case the notice was published a number of times; but the interval between the last publication and the passage of the ordinance was less than sixty days. Repetitions of the notice were reasonable, as they gave it greater publicity."* (Italics ours.)

In Philadelphia, Wilmington and Baltimore R. R. Co. *vs.* Shipley (72 Md., 90), an action to recover an assessment, the declaration alleging "that the ten days' notice required by said act was duly given by inserting the same, both in the Maryland Journal, a newspaper published at Towsontown, and in the Baltimore Sun, on the 4th day of February, 1888, the defense was that the declaration did not show compliance with the provisions of the statute in regard to giving notices. The court said, page 92:

> "Notices required to be given by the act under which this suit is brought are three in number: First, 'the examiner shall give at least ten days' notice by publication in one or more newspapers published in Baltimore county, and one newspaper of general circulation published in Baltimore city', that application has been made to open said street. * * * We think that when the declaration is tested by this statutory provision, it clearly appears by its allega-

tions that the plaintiff did all that he was required to do in giving notices.

"In Baltimore *vs.* Little Sisters of the Poor, 56 Md., 405, the court in construing a statute requiring that 'at least sixty days' notice shall be given' said: 'It is clear that the statute does not require a daily publication for sixty days in two newspapers, nor does it specify any number of times for the publication.' * * *

"And in this case we think the one publication in each of the two newspapers mentioned was enough to gratify the statutory requirement."

In Mayor and City Council of Baltimore *vs.* The Little Sisters of the Poor (56 Md., 400), which was a bill for injunction to restrain the collection of an assessment of benefits for the opening of McKim street, on the ground that the assessment was invalid for the want of sufficient preliminary notice required by law, which provided that "at least sixty days' notice shall be given of any application for the passage of such ordinance in at least two of the daily newspapers in the said city," the court held, page 406:

*"It is clear that the statute does not require a daily publication for sixty days in two newspapers, nor does it specify any number of times for the publication. According to its true construction, it requires that the notice shall be published in two of the daily newspapers of the city, and that a period of sixty days shall elapse after the publication of the notice, before any such ordinance shall be passed. Such has been the construction and uniform practice ever since the act of* 1838, *ch.* 236, *was passed containing the same provision now embodied in the local Code."* (Italics ours.)

"In Bouldin's case, 23 Md., 328, in which the question of the sufficiency of the notice was fully discussed, the record shows that it had been published four times in each of two daily newspapers. It was not suggested by the counsel for the appellee, in that case, that such a publication was not sufficient, provided it had been made at least sixty days before the

ordinance was passed. The point was therefore not distinctly referred to by the court; but it was held that the publication of the notice was sufficient.

"The cases of White *vs.* Malcolm, 15 Md., 529, and Johnson *vs.* Dorsey, 7 Gill., 269, 286, in which analogous questions arose, are strong authorities in support of the position taken by the appellant.

"In our opinion, the publication of the notice in this case was a sufficient compliance with the provisions of the Code."

In Harrison *vs.* Newman, 71 Kansas, 325, the court says:

"Section 160 provides that when a city appropriates private property for certain stated purposes (including the opening of an alley) the appraisers appointed shall ascertain the value of the land taken, and the damages to other property, and apportion the total in accordance with their judgment * * * and that they shall at least give three days' notice in the official city paper of the time and place of their meeting.

"The only notice in that case was by publication made in one issue of a daily paper nine days before the meeting of the appraisers. The plaintiff claims that this was not a compliance with the requirements of section 160, and argues that 'three days' notice in the official paper means three publications on three separate days in that paper.' We do not think this is a correct interpretation. A three days' notice of a meeting is a notice given three days before the meeting is to be held. One publication in a daily paper is notice, and if it is made three days in advance of the time set it is three days' notice (P. M. & B. R. R. Co. *vs.* Shipley, 72 Md., 90). Similar phrases are of frequent occurrence in the statutes in such connection as to admit of no other construction. Where a continuous publication is intended this is indicated by the requirement that it shall be 'for a stated time, or by some equivalent expression.'"

In McGilvery *vs.* The City of Lewiston (13 Idaho, 338), a recent case, involving the validity of a special assessment for sewers, the syllabus, paragraph 8, page 339, reads:

> "Where the statute provides for the giving 'of twenty days' notice' by publication in some newspaper, but does not specify any number of issues of the newspaper in which the notice shall be published, it is a sufficient compliance with the statute if the notice is published in one issue of the paper, and that publication occurs twenty days prior to the date of the meeting or other action of which the publication purports to give notice."

In Drainage District *vs.* Campbell (154 Mo., 151), the court, after stating the general rule that the provisions of the law in condemnation cases must be strictly complied with, in response to a contention that the notice was not published for fifteen days before the time at which the parties were notified to appear before the court, under a statute which authorized commissioners to proceed "on giving fifteen days' notice," said:

> "The time specified in the notice at which defendants were notified to appear before the judge was August 24, 1896, while its first insertion in the newspaper was on August 7, 1896, and thereafter weekly until the 21st of that month, when it was published for the last time. There was, therefore, seventeen days' notice, including the day of its first insertion in the paper, and excluding the 24th, the day upon which the application was heard. It was only necessary that fifteen days intervene between the first application and the time fixed for hearing the application, while, as has been said, there were seventeen days."

The above decision is significant because one of the authorities mainly relied upon by the respondents and cited in the opinion is Stine *vs.* Wilkson, 10 Mo., 75.

Following is another Missouri case modifying Stine *vs.* Wilkson:

> "German Bank *vs.* Stumpf, 73 Mo., 311, 314. This was an action of ejectment respecting property sold under a deed of trust, the allegation being that

the notice of sale did not satisfy the requirements of the law.

"The COURT: In regard to the notice, we are of opinion that the omission to publish it on the three days named does not render the sale void. * * * It is unnecessary, however, to make any conjectures upon the subject. When thirty days' notice is required, thirty days should, of course, intervene between the first publication and the day of sale; and although it may be customary and competent to continue the notice in every issue of the paper from its first insertion to the day of sale, yet it has been expressly decided that thirty days' notice in a daily paper does not mean thirty days' daily notice in such paper. *White vs. Malcolm*, 15 Mo., 543; *Johnson vs. Dorsey*, 7 Gill., 286; *Leffler vs. Armstrong*, 4 Iowa, 482. We think, however, that, where the notice has not appeared in every issue of the paper from its first insertion to the date of sale, and the omission to make continuous publication therefore is of such a character or is attended by such circumstances as to mislead the public and work an injury to the party whose property is sold, the same may be set aside. *Stine vs. Wilkson*, 10 Mo., 96."

In Muskingum Valley Turnpike Company *vs.* Ward, 13 Ohio, 120, concerning the provision of the statute requiring "at least sixty days' notice" to be given of the time and place of payment of stock instalments, the court said:

"The third ground for a new trial is that the notice was not published continuously for sixty days. This position stands upon the hypothesis that 'at least sixty days' notice' is equivalent to 'notice for and during sixty days.' The words are, however, not equivalent. Notice published once sixty days or more before the time of payment is all that the statute requires. *We are not left at liberty to imagine or suppose in this case that one thing is expressed and another intended, because whenever the legislature have designed that continuous notice shall be given they have used explicit terms. Had a continuous notice been intended in this class of cases we should*

*have found words more appropriate to convey that meaning, such as 'notice by publication at least sixty days prior to the day of payment, which notice shall be published daily, tri-weekly or weekly to the day of payment', or 'which notice shall be continued for eight consecutive weeks prior to the day of payment.'* The manifest object of requiring sixty days' notice was to give the stockholders reasonable time to prepare funds to meet the demands made upon them. The notice must be, from the power of the words used in the statute, complete at least sixty days before the day of payment. It could not be thus complete if, in order to perfect it, the necessity existed of renewing it each week during the sixty days." (Italics ours.)

In Andrews *vs.* Ohio & Mississippi Railway Co., 14 Ind., 169, a case involving the statutory provision as to notice for the payment of installments of stock, the court said:

"Two objections were made which we will notice: First, that the charter authorized calls by giving sixty days' notice in some newspapers, etc.; that this was inserted at a single time, whereas it should have been continuously. * * *

"Was the notice proved sufficient? We are of opinion that it was? The notice was not required to be published in different newspapers or issues of a newspaper. The notice began to operate from the time it was given. It was not by the statute required to be renewed, as in some other instances."

In Jenkins, assignee, *vs.* Pierce, 98 Ill., 646, attacking the validity of a deed of trust sale for lack of notice, the court, in its opinion, said:

"The mortgage provides that, in default of payment, 'Prather, his heirs, executors, administrators or assigns, after publishing a notice in a newspaper printed in the city of Chicago thirty days before the sale, may make sale of said premises.' The notice was published in a newspaper printed in the city of Chicago more than thirty days before the day of sale, and as to this there is no controversy. It was held

> in *Weld vs. Rees*, 48 Ill., 428, that, under a power containing identically the same language, but one publication was necessary. The notice published was, therefore, sufficient."

In *In re* Bassford, 50 New York Reports, 510, 511, the court concurred in the opinion of the judge at general term respecting the construction of the statutory provision for notice of an improvement for which an assessment was levied. The opinion concurred in is printed as a foot-note, and is in part as follows:

> "The design was to apprise the tax-payers in the manner pointed out in the statute of any contemplated improvement so that by remonstrance or suggestions the same might be modified or prevented. It is reasonable to suppose that such notice would be more available by waiting two days after its publication than by requiring two publications within twenty-four hours previous to the time of acting.
>
> "There was nothing in the Douglass case that decided this question, and I see no reason for changing the views on this point. All laws, requiring a party to have a given number of days' notice have been construed to mean only notice served so many days before the act can be done. * * * The object of the law was to provide notice to the persons interested that such a proposition was pending before them."

In Weld *vs.* Rees, 48 Ill., 428, involving the validity of a sale under a deed of trust under the statute providing for such sale "after publishing notice in a newspaper published in the city of Chicago ten days before the day of such sale," the court said:

> "It will be observed that the language does not in terms require notice to be published by ten daily insertions or a notice for ten days, the first insertion being ten days before the sale. If it had, then there might be some question as to the sufficiency of the notice. But the language is, 'after publishing a notice in a newspaper published in the city of Chi-

> cago ten days before the day of such sale.' Had there been but one insertion, and that on the first day of the month, it would have been a notice in a newspaper published ten days before the 13th of the month. The language, in terms, does not require, nor does it import, that the publication shall be a continuous one. * * * The language employed in this case would seem to have been employed to exclude the idea that the notice should be continuous, as it has no terms which would imply successive or continuous publication."

The following excerpt from the opinion of the court in Wight *vs.* Davidson, 181 U. S., 371, is pertinent:

> "It is also established by those authorities that, in proceedings of this nature, notice by publication is sufficient; and it accordingly follows that the order of publication, in the newspapers named, by the Supreme Court of the District gave due notice of the filing of the petition and an opportunity to all persons interested to show cause, if any they had, why the prayer of the petition should not be granted. Such notice also must be held to have operated as a notice to all concerned of the pending appointment of a jury, and that proceedings under the act of Congress would subsequently be had. This gave an opportunity for interested parties to attend the meetings of the jury, to adduce evidence, and be heard by counsell. The return of the marshal shows that some, at least, of the property owners appeared before the jury, produced witness, and were heard by counsel. If the appellees did not avail themselves of these opportunities, the court and jury, proceeding according to law, were not to blame."

*B. Alleged to support the contention of respondents.*

Stine *vs.* Wilkson, 10 Mo., 75, was a suit to set aside a foreclosure sale at a grossly inadequate price after an obscure advertisement suggesting fraud.

If this case is cited to sustain the proposition that a statutory requirement of a given number of days' notice

means that number of successive publications, it is overruled in the later Missouri cases—German Bank *vs.* Stumpf, 73 Mo., 311; Drainage District *vs.* Campbell, 154 Mo., 151, heretofore quoted.

Washington *vs.* Bassett *et al.*, 15 R. I., 563, relies upon Stine *vs.* Wilkson, which was afterward overruled.

Allen *vs.* Kerr, 13 Lea (Tenn.), 256, was a motion to retax costs in a foreclosure case in which the allowance of cost for twenty consecutive days' advertising was contested. The court held that the statute in that case allowed the court discretion as to the number of insertions, and the court having ordered the sale "after having given twenty days' notice," the cost of twenty successive publications was not an improper charge.

Armstrong *et al. vs.* Scott, 3 Greene (Iowa), 433, and Leffler *vs.* Armstrong, 4 Iowa, 487, held that a provision requiring "thirty days' public notice in some newspaper printed in Burlington" was satisfied by publications once a week in the weekly paper commencing thirty days before the day of sale. There was no indication in either of these cases that no daily paper was available, as intimated by the court in its opinion.

Land Co. *vs.* Loan & Trust Co., 52 Neb., 410, decides that a provision requiring "publication at least thirty days before the sale" is satisfied if the notice is published in five consecutive issues of a weekly newspaper.

These decisions, it is submitted, do not support the construction adopted by the Court of Appeals.

Delogny *vs.* Smith, 3 La., 418-423, another case of enforced alienation, held that a provision for sale after three months' advertisement meant that the sale should be had in each of the three months preceding sale.

Boswell's Lessee *vs.* Otis et al., 9 How., 336-350, is not at all in point. That case concerned the sale of certain land belonging to a non-resident of the State of Ohio brought into court by service by publication, but the particular land sold

was not involved in the case, and it was held in a collateral attack on the sale that the court had acquired jurisdiction only with respect to the land in suit.

## II.

**The Failure of the Court to Instruct as to Dedications.**

Section 491*g* provides, among other things, that—

> "where part of any lot, piece, parcel, or tract of land has been dedicated for the opening, extension, widening, or straightening of the street, avenue, road, or highway, the jury, in determining whether the remainder of said lot, piece, parcel, or tract is to be assessed for benefits, and the amount of benefits, if any, to be assessed, shall also take into consideration the fact of such dedication and the value of the land so dedicated."

If the contention of the petitioners as to the matter of jurisdiction is sustained, the respondents were at least constructively before the court. The Holmes Central Realty Company was actually represented at the hearing (R., 46). No instruction appears to have been requested by any of the parties respecting dedication, nor is the matter made the subject of any exception. This court will not review an alleged error unless brought up in due form by a bill of exceptions.

> Metropolitan Railway Company *vs.* District of Columbia, 195 U. S., 322.

The question was properly presented to the trial judge who heard all of the evidence on the objections by the respondents to the confirmation of the verdict. The trial judge overruled the exceptions and confirmed the verdict. It is in the nature of a motion for a new trial, and the

action of the trial judge will not, it is submitted, be reviewed here.

District of Columbia *vs.* Cemetery, 5th Apps. D. C., 497.

Columbia Heights Realty Company *vs.* McFarland, 217 U. S., 547, 560.

The matter of the justice of the verdict is one peculiarly under the cognizance of the trial judge, and this court has held that nothing but fraud, accident, or plain mistake apparent on the face of the verdict will justify a review of the trial court's action. Moreover, inspection of the verdict fails to disclose any elements of injustice.

The provision respecting dedications is an equitable one. It is one that is applied by a jury of "judicious, experienced, disinterested men," whether they are in terms instructed so to do or not. It is a provision peculiarly for application by the jury who have the opportunity of physical inspection of the land. The land that is claimed to have been dedicated for streets by the respondents is comprised in subdivisions recorded by them. It is a matter of common knowledge that the conversion of acreage land into suburban subdivisions requires the dedication of land for streets, etc., and the recorded subdivision shows the land so dedicated.

Such dedication is usually the most advantageous use to which the land could be put. The situation was here disclosed to the jury by the plats on record in the proceeding. Where one owner dedicates land for the widening or extension of a street and another occupying the same relation to the street refuses to dedicate, it would be unjust to penalize the owner who dedicates.

On the other hand, the rule should not be applied absolutely so as to force a dedication from an owner against his interest or against his pronounced objection. An enterprising real-estate exploiter will lay out and record a

subdivision which will abut the land of an adjoining owner who prefers to keep his property as it is. It is submitted that such an owner should not be absolutely at the mercy in all cases of his neighbor.

The respondents contend that the jury in this case should have assessed against the remainder of the land of those who did not dedicate an amount in excess of the amount awarded for their land exactly equivalent pro rata to the assessments against the lands of the respondents. It does not follow that the ends of justice required such an assessment. The respondents subdivided their land on Colorado avenue at a width which conformed with the highway plan. As to the adjoining owners Colorado avenue had a sufficient width; their land was nearer Sixteenth street, and they may have been satisfied with the situation as it was. The land of the respondents, however, by reason of their subdivision was left abutting an unsightly jog in the street which it was greatly to their advantage to have removed. The jury in fact assessed the remaining land of those who did not dedicate at a ratio per-foot front 50 per cent greater than the assessments against the land of the respondents, showing conclusively that they did take the dedication into consideration.

In respect to Kennedy street the Holmes Realty Corporation dedicated land for the opening of the street up to the holding which fronted on Sixteenth street. This holding was valuable property, every square foot of which was susceptible of use with reference to its Sixteenth-street front. This land the jury found was worth $2,820. The contention of the respondent the Holmes Realty Corporation is that they dedicated land for the extension of Kennedy street of much greater value than the amount awarded for the Sixteenth-street front. Their argument that there should be offset against any assessment against them the value of the land they dedicated would exempt them entirely from assessment, although the most casual examination of the

plat shows that the salvation of their enterprise depended upon the opening to Sixteenth street.

The jury were instructed (R., 35):

> "In determining the amounts to be assessed against the said lots, pieces, or parcels of land, to take into consideration the respective situations and topographical conditions of said lots, pieces, or parcels of land, and the benefits and advantages they might severally receive from the said extension of the said avenue."

An instruction to the jury to take dedications into consideration would have added little or nothing to this instruction. The plat showing the various subdivisions in the record was evidence to a jury of "judicious, experienced, disinterested men" of the dedication of the streets indicated thereon.

## III.

### The Burden of Proof as to Benefits.

The trial judge had refused to grant an instruction requested by certain of the property owners to the effect that the burden of proof rests upon the Commissioners of the District of Columbia to satisfy the jury as to the existence and extent of benefits. The Court of Appeals, while holding that the refusal to grant this instruction was error, intimated that in view of the other instructions granted in the case the error was not reversible.

The reasoning of the Court of Appeals on this proposition, it is respectfully submitted, is unsound. The provision respecting benefits in acts of this character has been repeatedly construed as a legislative adjudication of the existence and extent of benefits.

Bauman *vs.* Ross, 167 U. S., page 548.

Wight *vs.* Davidson, 181 U. S., page 371.

In Henderson *vs.* Macfarland, 33 Apps. D. C., page 317, the court said:

> "The act under consideration in the light of these authorities must be held an adjudication by Congress of the necessity for the extension of Harvard street, and of the benefits accruing to adjacent lots by such opening. Such an adjudication in the absence of any evidence that it is substantially inequitable will not be inquired into by the courts."

In the Bauman *vs.* Ross case, 167 U. S., at page 548, this court said:

> "The class of lands to be assessed for the purpose may be either determined by the legislature itself, by defining a territorial district, or by other designation; or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited.
>
> * * * * * * *
>
> "The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by commissioners.
>
> * * * * * * *
>
> "The class of lands to be assessed is defined by directing that the aforesaid sum 'shall be charged upon the lands benefited by the laying out and opening of such highway or reservation, or part thereof,' and that the jury 'shall ascertain and determine what property is thereby benefited.' And the rule of assessment is defined by the further direction that the jury 'shall assess against each parcel which it shall find to be so benefited its proper proportional part of 'the sum aforesaid.' * * *"

This law is emasculated by the construction that the jury may not find benefits unless the Commissioners of the Dis-

trict of Columbia successfully sustain the burden of proving their existence.

The main reliance of the appellants on this proposition is the case of The Mayor and City Council of Baltimore *vs.* The Smith and Schwartz Brick Company (80 Md., 458), which was an appeal from the judgment of the city court upon the verdict of the jury therein, one of the errors alleged being that the court had erroneously instructed the jury that the burden of proof rested upon the City Council of Baltimore to show to the satisfaction of the jury "the extent of the increase in the market value" of the property which was assessed for benefits. The Court of Appeals in that connection said, page 474:

> "We think this prayer was unobjectionable. The burden was on the city to establish the benefits this property was to be charged with. It certainly could not be said that the burden was cast on the company to prove that it was not benefited as much as the city claimed it was. There is no presumption of law in these cases that the assessment of the commissioners is correct."

This case was apparently a trial before a common-law jury upon issues of fact presented by the pleadings.

The question of the burden of proof depends upon the fundamental proposition that a party who affirms a fact must prove it. The jury in that case were evidently restricted to a consideration of the evidence adduced before them. The case at bar is a special proceeding providing for an award of damages and assessment of benefits by a jury of five experienced, judicious, disinterested men, who are required to go upon the land and view it, and then, after "hearing such evidence as may be offered to them by the parties interested or the District of Columbia, to return their verdict, in writing, signed by them or a majority of them, setting forth the amount found to be due and awarded by them as damages for the land condemned and the lots,

pieces, or parcels of land benefited and the amounts of the assessment for benefits against the same."

In the case of the Columbia Heights Realty Company *vs.* The Commissioners of the District of Columbia (217 U. S., 547), a case involving the validity of assessments only, referring to the findings of a similar jury, the court, respecting the authority to review the findings of such a jury, said, page 530:

> "The jury went upon and viewed the premises; the court did not. The duty to review did not involve mere error in judgment as to the extent of enhancement in value, for the judgment of the jury manifestly rested upon much which could not be brought before the court. The jury was expected to exercise its own judgment, derived from personal knowledge and from the view of the premises, as well as from the opinion evidence which might be brought before them."

The controlling circumstance in this case is that there has been here a legislative determination of benefits. There has been much discussion and many decisions have been rendered as to the conclusiveness of a legislative determination of benefits. In this jurisdiction the law remains as settled in the case of Wight *vs.* Davidson (181 U. S., 380), recently affirmed and reaffirmed in the cases of Columbia Heights Realty Company *vs.* The Commissioners of the District of Columbia (*supra*) and Briscoe *vs.* The Commissioners of the District of Columbia (221 U. S., 547). It has been the almost uniform practice of the courts before whom these cases are tried, however, to adopt a less stringent construction of these provisions. In the case at bar (R., 35) the concluding sentence of the first instruction granted reads:

> "The jury are instructed, however, that it is not incumbent on them to assess benefits arbitrarily; they should assess benefits only where they find an actual enhancement in value will accrue to the property by reason of the extension of said avenue."

This instruction, it is submitted, meets every objection that can be raised to the refusal of the instruction as to the burden of proof. Furthermore, the Commissioners of the District of Columbia invariably assume the responsibility of satisfying the jury as to the extent, both in area and in amount, of benefits resulting from a given improvement.

The record (R., 33) states that the petitioners and various property owners offered evidence tending to show the value of the land and premises sought to be condemned and the amount and extent of the benefits which would accrue to lands and premises in the District of Columbia by reason of the extension and widening of the streets involved.

But whatever difference of opinion may exist on the question of the conclusiveness of a legislative determination of benefits, there can be none, we submit, that such a legislative finding raises at least a presumption of their existence which dispenses with affirmative proof. In this case the petition of the Commissioners of the District of Columbia makes no affirmation as to the existence or extent of benefits. It sets up the provisions of the law and states that under the direction of the law they are making this application. They have no discretion about it. They ask the court to cause notice to be given, a jury summoned, and the other acts to be done which the law requires. If the contention of the appellants is sound, and the Commissioners offered no proof, or insufficient proof, as to the existence or extent of benefits, it would be the duty of the court to dismiss the proceeding. This, we submit, would be in contravention rather than in accordance with the provisions of the law.

## IV.

The Court of Appeals erred in directing the setting aside of the verdict *in toto,* notwithstanding only two parties appealed.

The contention that the necessary result of setting aside the assessment returned against the appellants would be the vacation of the assessment portion of the verdict *in toto* is answered by the provision of section 491*h* of the Code, which provides that the court—

> "shall hear and determine any objections or exceptions that may be filed to any verdict of the jury, and shall have power to vacate and set any verdict aside, in whole or in part, when satisfied that it is unjust or unreasonable, in which event the court shall cause a new jury of five experienced, judicious, disinterested men, who shall be freeholders in the District of Columbia, * * * who shall proceed to ascertain the damages or assess the benefits, or both, as the case may be, in respect of the land as to which the verdict may be vacated, * * * *Provided,* That if vacated in part, the residue of the verdict as to the land condemned or assessed shall not be affected thereby."

This contention is also met by the decision of this court in the case of Briscoe *vs.* MacFarland (32 App. D. C., 167), which was a suit in equity to set aside an assessment on the ground that the order of the District court confirming the assessment was void for want of jurisdiction. That was a proceeding under the law which entitled any party who was dissatisfied with the verdict of the first jury to a rehearing upon an expression of dissatisfaction. The assessment complained of in that case was confirmed by the court, notwithstanding such an expression of dissatisfaction thereto; but this court held that the assessee not having appealed from the judgment of confirmation was bound thereby. the neces-

sary inference being that such an assessee could not get the benefit of a successful appeal prosecuted by another party. The rather labored discussion by appellants of the practical difficulties of maintaining the equation in cases of partial reassessment is a subject with which this court is not concerned.

**Conclusion.**

The judgment of the Court of Appeals of the District of Columbia should be reversed and the judgment of the District Court should be affirmed.

CONRAD H. SYME,
*Corporation Counsel;*
JAS. FRANCIS SMITH,
*Assistant,*
*Attorneys for Petitioners.*

(27546)

13

Office Supreme Court, U. S.
FILED
MAR 12 1915
JAMES D. MAHER
CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

---

## No. 163.

---

CUNO H. RUDOLPH, JOHN A. JOHNSTON, AND CHESTER HARDING, PETITIONERS,

*vs.*

LYNCHBURG INVESTMENT CORPORATION AND HOLMES CENTRAL REALTY CORPORATION, RESPONDENTS.

---

**LIST OF CASES SHOWING PRACTICE AS TO NOTICE BY PUBLICATION IN CONDEMNATION CASES FOR STREETS AND ALLEYS.**

---

CONRAD H. SYME,
*Corporation Counsel, D. C.;*
JAMES FRANCIS SMITH,
*Assistant Corporation Counsel,*
*Attorneys for Petitioners.*

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

## No. 163.

CUNO H. RUDOLPH, JOHN A. JOHNSTON, AND CHESTER HARDING, PETITIONERS,

*vs.*

LYNCHBURG INVESTMENT CORPORATION AND HOLMES CENTRAL REALTY CORPORATION, RESPONDENTS.

## LIST OF CASES SHOWING PRACTICE AS TO PUBLICATION.

Following are lists of land condemnation cases instituted by the Commissioners of the District of Columbia, between the years 1900 and 1912, inclusive, in which the statutory provision that notice of "not less than ten days" or notice of "not less than twenty days" was construed by the Supreme Court of the District of Columbia as meaning that such number of days should elapse between the publication of notice and the return day.

In the street extension cases the court ordered the notice published six times. In alley cases publication was ordered to be made usually but once. In none of the cases was the publication ordered to be made continuously for the number of days mentioned in the Statute.

In Rosa Wallach *et al. vs.* Henry B. Macfarland *et al.* in the Supreme Court of the United States, October Term, 1909, No. 148, an example of the notice used appears at page 16 of the record. This notice was under the provision for publication of the act of June 6, 1900.

*List of Condemnation Cases for Streets in Which the Notice by Publication Consisted of Six Advertisements in Each Newspaper.*

| District Court Number. | Title. | Law. | Instituted. |
|---|---|---|---|
| 574 | Widening Columbia road | Act Con. June 6, 1900 | June 2, 1900 |
| 577 | Columbia road and 16th street | " " " 6, 1900 | July 12, 1900 |
| 580 | Sixteenth street | " " " 6, 1900 | Aug. 21, 1900 |
| 615 | Eighth st. or Wright's rd. | " " Apr. 22, 1904 | May, 1904 |
| 616 | 23rd street | " " " 22, 1904 | May 5, 1904 |
| 617 | Euclid place | " " " 28, 1904 | May, 1904 |
| 618 | Wyoming ave. and 23d street | " " " 28, 1904 | May 9, 1904 |
| 619 | Albemarle street | " " " 28, 1904 | May, 1904 |
| 620 | Kalorama avenue | " " " 28, 1904 | May, 1904 |
| 621 | V street, widening | " " " 28, 1904 | May, 1904 |
| 625 | North Brightwood | | June, 1904 |
| 629 | Fourteenth street | D. C. Appro. Act for year ending June 30, 1905 | Oct., 1904 |
| 630 | Zoological Pk. Con. highway | Act Con. Apr. 28, 1904 | Oct. 18, 1904 |
| 643 | M street | Act Con. Mch. 3, 1905 | Nov., 1905 |
| 650 | T street | " " " 3, 1905 | Nov., 1905 |
| 652 | Kalorama ave. to join with Prescott place | " " " 3, 1905 | Nov., 1905 |
| 653 | 19th street | " " " 3, 1905 | Mch. 31, 1905 |
| 667 | Plaza and Newton streets | | June 29, 1905 |
| 674 | Rittenhouse street | " " " 3, 1905 | Nov. 2, 1905 |
| 682 | Rhode Island avenue | Feb. 19, 1906 | Mch. 22, 1906 |
| 686 | Kalorama road | June 29, 1906 | July 20, 1906 |
| 687 | Euclid street | June 11, 1906 | June 29, 1906 |
| 698 | 16th and Columbia road | June 30, 1906 | Oct. 29, 1906 |
| 699 | 16th and Piney Branch rd. | June 30, 1906 | Oct. 29, 1906 |
| 703 | Massachusetts avenue | D. C. Appro. Act for the year ending June 30, 1907 | Aug. 23, 1906 |
| 711 | Widening Columbia road | Jan. 9, 1907 | Feb. 6, 1907 |
| 712 | Second and W streets | Jan. 9, 1907 | Feb. 7, 1907 |
| 713 | Meridian place | " " " | Jan. 29, 1907 |
| 714 | 4th street N. E. | Jan. 22, 1907 | |
| 715 | Kenyon street | " " " | Feb. 20, 1907 |
| 717 | 23d street from U to Kalorama road | Jan. 9, 1907 | Feb. 19, 1907 |
| 718 | 6th, 7th and Franklin streets N. E. | Jan. 9, 1907 | Feb. 26, 1907 |
| 720 | Macomb street | Jan. 21, 1907 | Feb. 23, 1907 |

| | | | | |
|---|---|---|---|---|
| 721 | Harvard street | Jan. 22, 1907 | Feb. 26, 1907 | |
| 722 | Fessenden street | " " " | Mch. 8, 1907 | |
| 723 | Waterside drive | " " " | Mch. 18, 1907 | |
| 725 | School street | Feb. 8, 1907 | Mch. 5, 1907 | |
| 726 | Geneseo place | Jan. 9, 1907 | Feb. 23, 1907 | |
| 727 | Monroe street, Anacostia | Dis. Appro. Act June 17, 1903 | Apr. 9, 1907 | |
| 728 | Warren and 46th streets | Feb. 26, 1907 | Mch. 22, 1907 | |
| 729 | T street, formerly W street | Feb. 27, 1907 | Apr. 27, 1907 | |
| 730 | Forty-fifth street | " " " | Mch. 18, 1907 | |
| 731 | Monroe street | Mch. 2, 1907 | Apr. 12, 1907 | |
| 732 | Mills avenue | " " " | Apr. 22, 1907 | |
| 730 | Albemarle street | " " " | Mch. 15, 1907 | |
| 735 | Piney Branch parkway between 16th street and Rock Creek road | Feb. 27, 1907 | Apr. 16, 1907 | |
| 737 | New Hampshire avenue | Feb. 27, 1907 | Apr. 29, 1907 | |
| 739 | Park place | Mch. 1, 1907 | Apr. 18, 1907 | |
| 766 | Bladensburg road | Jan. 9, 1907 | Mch. 10, 1908 | |
| 769 | W and Adams street | Feb. 28, 1907 | Dec. 30, 1907 | |
| 775 | Widening G street | May 23, 1908 | July 16, 1908 | |
| 801 | 2d and W N. W. | Jan. 9, 1907 | | |
| 812 | Girard street N. W. | Feb. 26, 1909 | Mch. 30, 1909 | |
| 813 | 20th street | Mch. 3, 1899 | Apr. 8, 1909 | |
| 819 | New York avenue | Feb. 6, 1909 | * | 1909 |
| 820 | Rittenhouse street | Feb. 25, 1909 | | 1909 |
| 821 | Mass. avenue S. E. | " " " | | " |
| 822 | Ninth street | Feb. 26, 1909 | | " |
| 823 | Minn. avenue S. E. | Feb. 25, 1909 | | " |
| 824 | Anacostia River road | Mch. 4, 1909 | | " |
| 872 | 41st street N. W. | Mch. 23, 1910 | | 1910 |
| 874 | Park place | Feb. 21, 1910 | | " |
| 878 | Newton place | Feb. 27, 1910 | | " |
| 880 | 13th street building line | June 21, 1906 | | " |
| 890 | Columbia road | Mch. 23, 1910 | | " |
| 891 | 23d street and R streets S. E. | Mch. 2, 1910 | | " |
| 895 | Belmont road and Waterside drive | Mch. 2, 1910 | | " |
| 902 | Military road | Mch. 23, 1910 | | " |
| 914 | Princeton place | Apr. 20, 1910 | | " |
| 921 | Nineteenth street | May 18, 1910 | | " |
| 922 | 1st street | June 11, 1910 | | " |
| 926 | Anacostia River | May 10, 1910 | | " |
| 927 | Widening Cedar street | D. C. Appro. Act May 18, 1910 | | " |
| 935 | Mass. avenue N. W. | June 22, 1910 | | 1911 |
| 958 | 17th street N. E. | Mch. 4, 1911 | | " |
| 963 | Extension 13th street | Feb. 20, 1911 | | " |

* Precise dates can be ascertained from the record.

| | | | |
|---|---|---|---|
| 965 | Interior Park, sq. 534 | D. C. Appro. Act Mch. 2, 1911 | " |
| 966 | Van Buren street | Mch. 3, 1911 | " |
| 969 | Extension of Q street | D. C. Appro. Act Mch. 2, 1911 | " |
| 970 | Zoological pk. entrance | D. C. Appro. Act Mch. 2, 1911 | " |
| 990 | Colorado ave. and Kennedy street | June 30, 1911 | " |
| 1001 | Bladensburg road | | 1912 |
| 1025 | Building line Col. rd. | June 21, 1906 | " |
| 1040 | Lamont street | Mch. 1, 1912 | " |
| 1048 | Underwood street | July 17, 1912 | " |
| 1050 | Building line Park rd. | June 21, 1906 | " |

*List of Condemnation Cases for Alleys and Minor Streets in Which the Notice by Publication Consisted of One Advertisement in Each Newspaper.*

Proceedings Instituted under Section 1608 to 1608 1 of the District Code.

| District court number. | Title. | When instituted. |
|---|---|---|
| 657 | Alley, block 6, Ingleside | Apr. 29, 1905 |
| 659 | Alley, block 41, North Grounds Columbian University, block 42, University Park. | May 11, 1905 |
| 668 | Alley, through part block 12, Meridian Hill and part of block 8, Washington Heights. | July 10, 1905 |
| 675 | Brown street (a minor street). | Nov. 16, 1905 |
| 676 | Alley in square 61. | Dec. 4, 1905 |
| 681 | Columbia Heights and block 19, Todd & Brown's subdivision. | Apr. 7, 1906 |
| 683 | Widening alley in square 750. | June 2, 1906 |
| 684 | Opening alley in block 23, Columbia Heights. | June 2, 1906 |
| 685 | Opening alley from Euclid street to Douglas street between block 18, Meridian Hill and block 45, University Park. | June 12, 1906 |
| 688 | Alley in block 32, Columbia Heights. | July 25, 1906 |
| 692 | Minor street in square 512. | Sept. 6, 1906 |
| 693 | Minor street in square 650. | Sept. 10, 1906 |
| 695 | Minor street in square 878. | Sept. 27, 1906 |
| 696 | Alley in Washington Heights and Widow's Mite. | Oct. 16, 1906 |
| 701 | Minor street in square 1020. | Nov. 15, 1906 |
| 702 | Alley in square 870. | Nov. 10, 1906 |
| 704 | Condemnation of alley in square 801, made a minor street from M to N streets. | Nov. 15, 1906 |

| | | |
|---|---|---|
| 706 | Alley in block 10, Todd & Brown's subdivision. | Dec. 10, 1906 |
| 707 | | |
| 708 | Alley through squares 2668 and 2669. | Dec. 14, 1906 |
| 724 | Alley in square 1046. | Jan. 31, 1906 |
| 738 | Alley through square 2855. | May 16, 1907 |
| 744 | Alley, entering square 1294 from T street. | June 10, 1907 |
| 748 | Alley in square 905. | June 19, 1907 |
| 753 | Alley in square 743. | Dec. 6, 1907 |
| 755 | Alley in square 2844. | Nov. 21, 1907 |
| 761 | Alley in square 807. | Dec. 26, 1907 |
| 763 | | |
| 764 | Alley in square 347. | Apr. 14, 1909 |
| 768 | Alley in square 2666. | Mch. 20, 1908 |
| 784 | Alley in square 1036. | July 16, 1908 |
| 785 | Alley in square 3516. | July 3, 1908 |
| 788 | Alley in square 2847. | June 27, 1908 |
| 789 | Alley in squares 3530-3526. | Oct. 12, 1908 |
| 792 | Alley in square 127. | Aug. 27, 1908 |
| 793 | Alley in square 2854. | Dec. 8, 1906 |
| 794 | Alley in square 2859. | Oct. 30, 1908 |
| 799 | Establishment of building line from Park road to School street N. W. | Nov. 25, 1908 |
| 809 | Alley in square 2834. | Nov. 30, 1908 |
| 810 | Alley in square 2580. | Mch. 22, 1909 |
| 816 | Alley in square 1035. | Apr. 28, 1909 |
| 817 | Alley in square 32. | Apr. 27, 1909 |
| 861 | | |
| 866 | Alley in square 2615. | Mch. 17, 1910 |
| 867 | Alley in square 2862. | Mch. 17, 1910 |
| 868 | Widening alley in square 2581. | * 1910 |
| 879 | Alley in square 2583. | 1910 |
| 884 | Alley in square 734. | 1910 |
| 885 | Alley in square 211. | 1910 |
| 886 | Alley in square 2863 | 1910 |
| 897 | Alley in square 2833. | 1910 |
| 898 | Alley in square 252. | 1910 |
| 899 | Alley in square 1043. | 1910 |
| 901 | Alley in square 3039. | 1910 |
| 915 | Alley in square 1014. | 1910 |
| 916 | Alley in square 2861. | 1910 |
| 942 | Alley in square 100. | 1911 |
| 960 | Alley in square 2563. | 1911 |
| 961 | Alley in square 2527. | 1911 |
| 972 | Alley in square 518. | 1911 |
| 973 | Alley in square 970. | 1911 |
| 974 | Alley in square 794. | 1911 |
| 975 | Alley in square 812. | 1911 |
| 976 | Alley in square 111. | 1911 |

* Precise dates can be ascertained from the record.

| | | |
|---|---|---|
| 977 | Alley in square 2857. | 1911 |
| 988 | Alley in square 2843. | 1911 |
| 998 | Alley in square 32. | 1911 |
| 1002 | Alley in square 3019. | 1912 |
| 1008 | Alley in square 2885. | 1912 |
| 1020 | Alleys in square 2829. | 1912 |
| 1019 | Alley in square 2858. | 1912 |
| 1021 | Alleys in square 2591. | 1912 |
| 1027 | Alley in square 2897. | 1912 |
| 1022 | Alley in square 757. | 1912 |
| 1029 | Alley in square 2830. | 1912 |
| 1026 | Alley in square 910. | 1912 |
| 1024 | Minor street in square 2888. | 1912 |
| 1039 | Minor street, square 16. | 1912 |
| 1031 | Alley in square 2551. | 1912 |
| 1041 | Minor street, block 3532. | 1912 |
| 1042 | Alley in square 377. | 1912 |
| 1037 | Minor street, through square 2895. | 1912 |
| 1038 | Alley in square 3049. | 1912 |
| 1043 | Alley in square 2892 (block 8, Mt. Pleasant). | 1912 |
| 1051 | Alley in square 957. | 1912 |
| 1057 | Alleys in square 1045. | 1912 |
| 1088 | Alley in square 3233. | 1912 |
| 1085 | Alley in square 2839 (Holmead Manor). | 1912 |
| 1056 | Alley in square 2537. | 1912 |
| 1071 | Minor street, square 5805. | 1912 |
| 1087 | Alley in square 1007. | 1912 |

Respectfully submitted,

CONRAD H. SYME,
*Corporation Counsel.*
JAMES FRANCIS SMITH,
*Assistant.*

FILED
MAY 6 1916
JAMES H. MCKENNEY

No. [redacted]

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1915.

---

CUNO H. RUDOLPH ET AL., PETITIONERS,

vs.

LYNCHBURG INVESTMENT CORPORATION ET AL., RESPONDENTS.

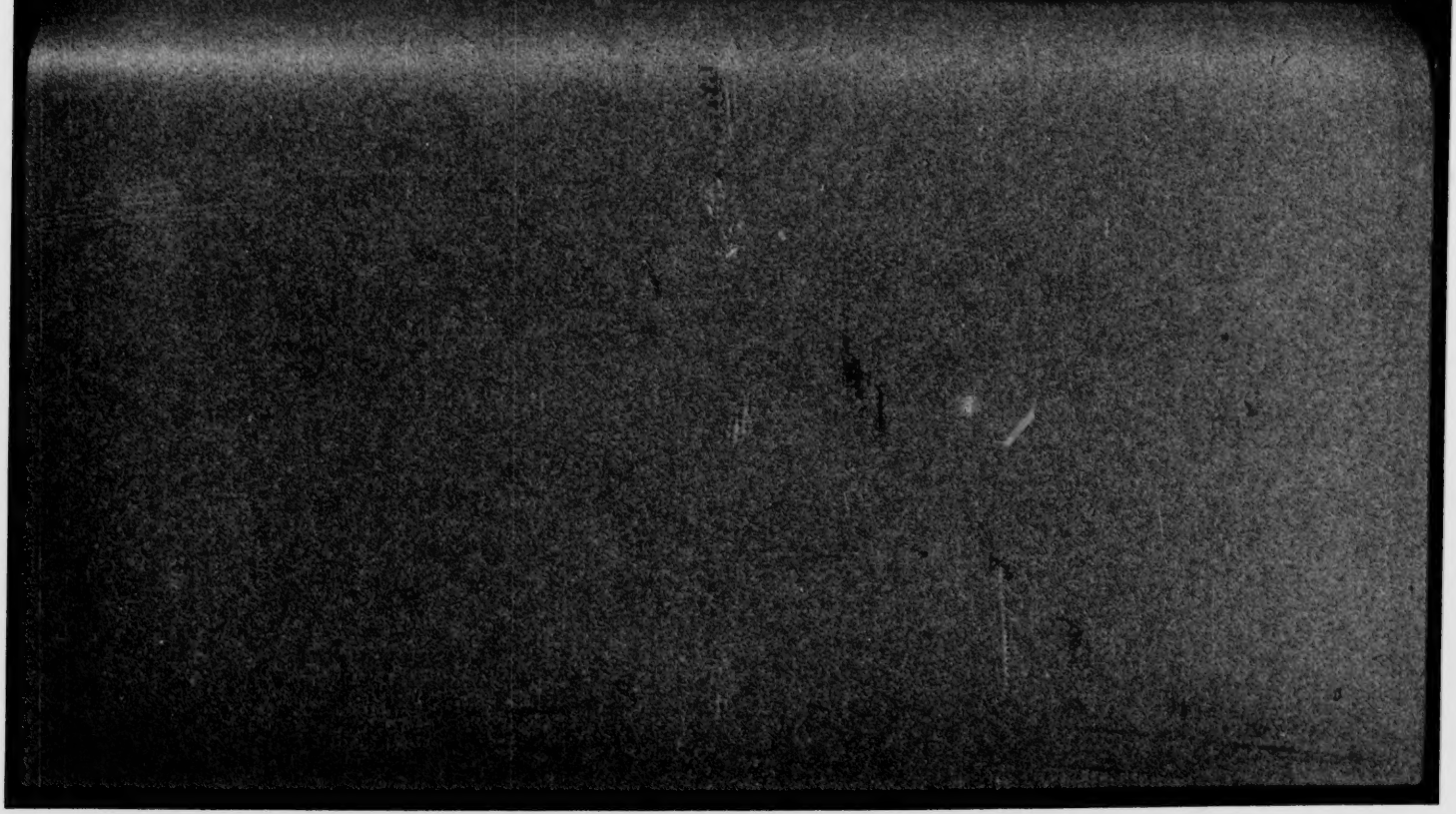
---

## BRIEF FOR RESPONDENTS.

---

JOSEPH W. COX,
W. C. SULLIVAN,
*Attorneys for Respondents.*

THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1912.

---

CUNO H. RUDOLPH ET AL., PETITIONERS,

*vs.*

LYNCHBURG INVESTMENT CORPORATION ET AL., RESPONDENTS.

---

## BRIEF FOR RESPONDENTS.

---

The petitioners, as Commissioners of the District of Columbia, filed a petition in the Supreme Court of the Distr ct of Columbia, for the condemnation of and under the provisions of sections 491a to 491n of the Code of Law for the District of Columbia, section 491c of which provides:

> "The court shall cause *public* notice of not less than twenty *days* to be given of the institution of such proceed ng, by advertisement in three *daily* newspapers published in the District of Columbia" etc. (italics ours).

The court passed an order on November 28, 1911, requiring all persons having any interest in the proceedings to appear in court on or before January 9, 1912, and that such order be published once in the Washington Law Reporter, and six times in the Washington Evening Star, the Washington Herald, and the Washington

Post, commencing at least twenty days before the return day. Publication was made in the Washington Law Reporter on December 1, 1911, and in the three newspapers between November 29th and December 8, 1911.

No appearance was made or entered for, or on behalf of, the Lynchburg Investment Corporation except a special appearance by motion to vacate, hereafter referred to, and no appearance was entered by the Holmes Central Realty Corporation, before the verdict, although its counsel was present in court at the time the cause was argued to the jury (Rec., p. 34). The Lynchburg Investment Corporation had no notice of the pendency of the proceeding, either actual or constructive, un'ess notice is to be implied from the fact of publication (Rec., p. 29).

After the jury had returned its verdict, objections and exceptions were filed by both of the respondents, the Lynchburg Investment Corporation appearing specially for the purpose of moving the court to vacate the verdict on the grounds, among others following: That the publication was defective in that public notice of not less than twenty days was not given by advertisement in three daily newspapers and the court therefore did not acquire jurisdiction to assess benefits against it, or the land owned by it; that though it had, on September 10, 1899, dedicated for the extension and widening of Colorado Avenue more than 50,000 square feet of ground, the fact of its dedication was not brought to the attention of the jury by the petitioners, who well knew the facts, and the Lynchburg Investment Corporation, by reason of its lack of notice of the proceedings, had no opportunity to do so, and in consequence, the jury did not take into consideration the fact of such dedication, or the value of the land so dedicated, and were not instructed by the court so to do.

This second gound of the motion to vacate was based upon section 491g of the Code, which provides that:

> "Where part of any lot, piece, parcel, or tract of land has been dedicated for the opening, extension, widening or straightening of a street, avenue, road or highway, the jury, in determining whether the remainder of said lot, piece, parcel or tract is to be assessed for benefits, and the amount of benefits, if any, to be assessed thereon, shall also take into consideration the fact of such dedication, and the value of the land so dedicated."

The motion to vacate and all objections to the verdict were overruled, the verdict was confirmed, and appeal was taken to the Court of Appeals of the District of Columbia, where the order ratifying and confirming the verdict was reversed upon the two grounds stated.

The contention of the respondents, in the Court of Appeals, upon the first ground, was, briefly stated, that the statute required a *continuous* publication in each of the three daily newspapers, for the twenty days *immediately* preceding the return day; that the last publication having been made on December 8th, thirty-two days prior to the return day, which was January 9th, and no publication having been made within twenty days of the return day, the attempted notice was insufficient in this particular, since, if the entire publication can be made twelve days more than twenty days before the return day, it may as well be made a month a year, or many years in advance of that day (Delogny et al. *vs.* Smith et al., 3 La., 418, 423), and also because when publication is to be made in a monthly, a weekly, or a daily paper, or is to be made monthly, weekly or daily, the first publication constitutes notice from the time of its issue until the next issue of the paper appears, and until the expiration of the prescribed period, and it must be made every month, every week, or every day, as the case

may be, during the period of publication—in other words, in every issue of the paper, or once every month, week or day, for publication is not an instantaneous act, but endures throughout the period elapsing between the issue of one number of the paper to the issuing of the next; and these views are sustained by every case, which has considered the question upon reason.

Washington *vs.* Bassett et al., 15 R. I., 563.
Armstrong et al. *vs.* Scott, 3 Greene (Iowa), 433.
Leffler *vs.* Armstrong, 4 Iowa 482, 487; 29 Cyc., 1121.
Railroad Co. *vs.* Montgomery, 49 Neb., 439.
Allen et al. *vs.* Kerr et al., 13 Lea (Tenn.), 256.
Land Co. *vs.* Loan & Trust Co., 52 Neb., 410, 413.

No one of the cases cited by the petitioners amounts to more than an ipsi dixit. In no one of them is the decision argued out or reasoned in any satisfactory manner. These citations were all carefully considered in the briefs and on the agrument in the Court of Appeals, and it is not considered advisable to consume space with a review of them here. The case resolving itself, as it necessarily does, in the last analysis, upon this application, to the simple question, which line of authorities the Court of Appeals should have adopted, it is not conceivable that this court will grant a writ of certiorari to review that question.

The Court of Appeals adopted the contention of the respondents here, holding the statutory requirements as to the giving of notice had not been complied with, and that the failure of the trial court to establish its jurisdiction by proper notice was fatal and rendered the w. ole proceeding void and of no effect. In this ruling, the Court of Appeals simply followed the uniform course of decisions in this court, as announced in many cases, of which Boswell's Lessee *vs.* Otis et al., 9 How., 336, 350,

and Bellingham, etc., Co. *vs.* New What om 172 U. S., 314, 318, are illustrative.

With respect to the second question presented by the petition in this court, the original petition upon which the proceeding was based sought to condemn, in the aggregate, for the widening and extension of both Colorado Avenue and Kennedy Street, a grand total of 78,603.92 square feet of land; and re-po1 ents h d, ri : to the time of filing that petition, dedicated in the aggregate 122,000 square feet for the widening and extension of these highways, 69,574.8 feet having been dedicated in the line of Colorado Avenue by the Lynchburg Investment Corporation, and 13,000 feet in the line of that avenue and 39,304.40 feet in the line of Kennedy Street having been dedicated by the Holmes Central Realty Corporation (Exhibit Plats, Rec., p. 42). It is apparent, therefore, that the respondents dedicated the principal part of the land required for the opening and extension of the street and avenue in question; the Lynchburg Investment Corporation dedicated more than one-half the width of Colorado Avenue throughout nearly the whole length of the extension, and the Holmes Central Realty Corporation dedicated a considerable area of that avenue, as well as the whole of Kennedy Street from Fourteenth to Sixteenth Streets, except the small triangular corner sought to be condemned in these proceedings.

Nothwithstanding these facts, the jury was not informed in any manner whatever that either of the respondents had dedicated an inch of land anywhere, nor were they instructed upon the matter at any time. Their verdict was carefully analyzed in the briefs filed in the Court of Appeals and in the argument before that court, and demonstrated beyond the shadow of a doubt that, instead of taking "into consideration the fact of such dedication, and the value of the land so dedicated,"

in determining the matter of benefits, the jury assessed lands owned by these respondents more heavily, viewed from any and every angle, than lands of other property owners, similarly situated, who had made no dedication whatever.

The court sustained the respondents' contentions in this respect, also, and said:

> "It appears that upon the basis of the lowest valuation fixed by the jury the value of the land dedicated by appellant Lynchburg Investment Corporation is $21,000, and upon the same basis the value of the land dedicated by appellant Holmes Central Realty Corporation is $15,000. From an examination of the record, we are convinced that the jury did not take into consideration these valuable dedications to the District in assessing benefits. In fact, in the bill of exceptions it is stated that no evidence was presented on this subject. Appellant's lands seem to have been assessed higher than those who had made no dedication. Indeed, it is difficult to determine upon what hypothesis the jury proceeded in assessing benefits in this case. The quality of an assessment must be apparent on the face of the record. Brandenburg *vs.* District of Columbia, 205 U. S. 135. It is no answer that appellants did not request this instruction. It was the duty of the court to follow the plain mandates of the law. The dedication of the land in question was a fundamental issue in arriving at a just assessment. In fact, no just assessment could be made without first considering the dedication."

We might here observe that, as the Lynchburg Investment Corporation had no knowledge of the pendency of the proceeding until after the verdict had been returned, it was entirely out of the question for it to make any such request or to offer proof in that regard.

The court concludes its opinion in the following language:

> "There is no theory upon which this omission of the court can be regarded as harmless error. Neither can the error be corrected by the reversal of the judgment in part, as may be done under the statute where the correction will work no injustice. It is impossible here to separate the assessments for benefits. Hence, new assessments should be made, taking into consideration the dedications of appellants. When this is done, it will doubtless demand an entire reapportionment between the properties found to be benefited. The judgment is reversed with costs, and the cause remanded for further proceedings."

We respectfully invite the attention of the court to the inaccuracy of the statement in the petition that "the record shows that the part (probably meaning party) most affected by this question was present and participated at the hearing before the jury." Of course, the failure of the Lynchburg Investment Corporation to offer evidence of the dedication or request instructions in respect thereof, as suggested by the petitioners in the same connection, was due to the fact already adverted to that it did not know of the pendency of the proceeding. So far from it being true that the party most affected by the question of dedication, was present and participated at the hearing before the jury, no appearance was made or entered for or by the Lynchburg Investment Corporation (which was the party most affected by this question) until, or except, by its special appearance on the motion to vacate; and no appearance was entered by the Holmes Central Realty Corporation before the verdict, though its counsel was present in court at the time the cause was argued to the jury (Rec., p. 34).

In its last analysis the application for this special and extraordinary writ is based entirely upon the suggestion of the petitioners to the court that because they have for so many years been violating the law it would be a matter of considerable inconvenience to them to require

in determining the matter of benefits, the jury assessed lands owned by these respondents more heavily, viewed from any and every angle, than lands of other property owners, similarly situated, who had made no dedication whatever.

The court sustained the respondents' contentions in this respect, also, and said:

> "It appears that upon the basis of the lowest valuation fixed by the jury the value of the land dedicated by appellant Lynchburg Investment Corporation is $21,000, and upon the same basis the value of the land dedicated by appellant Holmes Central Realty Corporation is $15,000. From an examination of the record, we are convinced that the jury did not take into consideration these valuable dedications to the District in assessing benefits. In fact, in the bill of exceptions it is stated that no evidence was presented on this subject. Appellant's lands seem to have been assessed higher than those who had made no dedication. Indeed, it is difficult to determine upon what hypothesis the jury proceeded in assessing benefits in this case. The quality of an assessment must be apparent on the face of the record. Brandenburg *vs.* District of Columbia, 205 U. S., 135. It is no answer that appellants did not request this instruction. It was the duty of the court to follow the plain mandates of the law. The dedication of the land in question was a fundamental issue in arriving at a just assessment. In fact, no just assessment could be made without first considering the dedication."

We might here observe that, as the Lynchburg Investment Corporation had no knowledge of the pendency of the proceeding until after the verdict had been returned, it was entirely out of the question for it to make any such request or to offer proof in that regard.

The court concludes its opinion in the following language:

> "There is no theory upon which this omission of the court can be regarded as harmless error. Neither can the error be corrected by the reversal of the judgment in part, as may be done under the statute where the correction will work no injustice. It is impossible here to separate the assessments for benefits. Hence, new assessments should be made, taking into consideration the dedications of appellants. When this is done, it will doubtless demand an entire reapportionment between the properties found to be benefited. The judgment is reversed with costs, and the cause remanded for further proceedings."

We respectfully invite the attention of the court to the inaccuracy of the statement in the petition that "the record shows that the part (probably meaning party) most affected by this question was present and participated at the hearing before the jury." Of course, the failure of the Lynchburg Investment Corporation to offer evidence of the dedication or request instructions in respect thereof, as suggested by the petitioners in the same connection, was due to the fact already adverted to that it did not know of the pendency of the proceeding. So far from it being true that the party most affected by the question of dedication, was present and participated at the hearing before the jury, no appearance was made or entered for or by the Lynchburg Investment Corporation (which was the party most affected by this question) until, or except, by its special appearance on the motion to vacate; and no appearance was entered by the Holmes Central Realty Corporation before the verdict, though its counsel was present in court at the time the cause was argued to the jury (Rec., p. 34).

In its last analysis the application for this special and extraordinary writ is based entirely upon the suggestion of the petitioners to the court that because they have for so many years been violating the law it would be a matter of considerable inconvenience to them to require

that they change their practice, and the decision of the Court of Appeals in this case might constitute a precedent for upsetting some of the unlawful acts of the petitioners in the past. The novelty of this contention is about the only thing imaginable to commend it.

Our understanding of the law is that—

> "while the power of this court to award the writ of certiorari is co-extensive with all possible necessities and sufficient to secure a final control over the litigation in all the courts of appeals, yet it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interests of this Nation in its internal or external relations, demands such exercise."

Forsyth *vs.* Hammond, 166 U. S., 506, 514-15.

Lau Ou Bew, Petitioner, 141 U. S., 583, 587.

In re Woods, 143 U. S., 202.

Lau Ou Bew *vs.* United States, 144 U. S., 47, 58.

Construction Co. *vs.* Rai road Co., 148 U. S., 372, 383.

It is accordingly respectfully submitted that the present application not only does not present any question of such a nature as this court has held to be essential to the exercise of the discretionary power sought to be invoked, but that the questions involved are purely and entirely of local concern, and the contentions of the petitioners wholly devoid of merit.

Respectfully,

JOSEPH W. COX,

W. C. SULLIVAN,

*Attorneys for Respondents.*

CONTENTS.


| | Page |
|---|---|
| *Statement of case* | 1 |
| *Questions submitted and decided in the Court of Appeals* | 4 |
| *Argument:* | |
| I. Failure to consider dedications in making assessments of benefits as directed by statute requires the verdict of the jury to be set aside | 5 |
| 1. Injustice will result to the respondents if verdict is allowed to stand | 5 |
| 2. The provision of the code which was disregarded in the making of assessments is mandatory, and such disregard necessitates the setting aside of the verdict | 10 |
| 3. Even if the provision were not mandatory, the plain error involved in disregarding it requires that the verdict be set aside | 16 |
| II. The notice as published was not sufficient to authorize the making of assessments | 20 |
| III. The burden of proof was upon the District to show the extent of benefits | 32 |
| *Appendix* | 34 |


TABLE OF AUTHORITIES.


| | |
|---|---|
| Aldis v. Park Commissioners, 171 Ill., 424 | 29 |
| Allen v. Kerr, 13 Les. (Tenn.), 256 | 28 |
| Armstrong v. Scott, 3 Greene (Ia. A.), 433 | 26 |
| Barber Asphalt Paving Co. v. Watt, 51 La. Ann., 1345 | 12 |
| Bellingham v. New Whatcom, 172 U. S., 314 | 21 |
| Bennett v. Woody, 137 Mo., 377 | 33 |
| Berdel v. Chicago, 217 Ill., 429 | 17 |
| Boswell's Lessee v. Otis, 9 How., 336 | 21 |
| Brandenburg v. District of Columbia, 26 App. D. C., 140 | 16-18 |
| Brandenburg v. District of Columbia, 205 U. S., 135 | 18-19 |

CONTENTS.


| | Page |
|---|---|
| *Statement of case* | 1 |
| *Questions submitted and decided in the Court of Appeals* | 4 |
| *Argument:* | |
| I. Failure to consider dedications in making assessments of benefits as directed by statute requires the verdict of the jury to be set aside | 5 |
| 1. Injustice will result to the respondents if verdict is allowed to stand | 5 |
| 2. The provision of the code which was disregarded in the making of assessments is mandatory, and such disregard necessitates the setting aside of the verdict | 10 |
| 3. Even if the provision were not mandatory, the plain error involved in disregarding it requires that the verdict be set aside | 16 |
| II. The notice as published was not sufficient to authorize the making of assessments | 20 |
| III. The burden of proof was upon the District to show the extent of benefits | 32 |
| *Appendix* | 34 |


TABLE OF AUTHORITIES.


| | |
|---|---|
| Aldis v. Park Commissioners, 171 Ill., 424 | 29 |
| Allen v. Kerr, 13 Les. (Tenn.), 256 | 28 |
| Armstrong v. Scott, 3 Greene (Ia. A.), 433 | 26 |
| Barber Asphalt Paving Co. v. Watt, 51 La. Ann., 1345 | 12 |
| Bellingham v. New Whatcom, 172 U. S., 314 | 21 |
| Bennett v. Woody, 137 Mo., 377 | 33 |
| Berdel v. Chicago, 217 Ill., 429 | 17 |
| Boswell's Lessee v. Otis, 9 How., 336 | 21 |
| Brandenburg v. District of Columbia, 26 App. D. C., 140 | 16-18 |
| Brandenburg v. District of Columbia, 205 U. S., 135 | 18-19 |

| | Page |
|---|---|
| Brown v. Macfarland, 19 App. D. C., 525 | 14 |
| Central of Georgia Ry. v. Wright, 207 U. S., 127 | 20 |
| Central Savings Bank v. Baltimore, 71 Md., 515 | 29 |
| Chamberlain v. Cleveland, 34 Ohio St., 551 | 12 |
| Columbia Heights Realty Co. v. Macfarland, 217 U. S., 547 | 16 |
| 2 Cooley on Taxation, 929-30 | 22 |
| Delogny v. Smith, 3 La., 418 | 23 |
| Dick v. Foraker, 155 U. S., 404 | 22 |
| Didden v. Harrington, 189 U. S., 255 | 20 |
| Dillon on Municipal Corporations, Sec. 1402 | 11 |
| Drainage District v. Campbell, 154 Mo., 151 | 30 |
| Ede v. Cuneo, 126 Cal., 167 | 12 |
| Espert v. Chicago, 201 Ill., 264 | 17 |
| Fay v. Macfarland, 32 App. D. C., 295 | 12 |
| Galpin v. Page, 18 Wall., 350 | 21 |
| Goodrich v. Detroit, 184 U. S., 432 | 20 |
| Guaranty Trust Co. v. Green Cove R. R., 139 U. S., 137 | 22 |
| Hamilton on Assessments, Secs. 559-762 | 11-33 |
| Hibbin v. Smith, 191 U. S., 310 | 20 |
| Jenkins v. Pierce, 98 Ill., 646 | 31 |
| Leffler v. Armstrong, 4 Iowa, 482 | 27 |
| Lewis on Eminent Domain | 12 |
| Lill v. Chicago, 29 Ill., 31 | 12 |
| Londoner v. Denver, 210 U. S., 373 | 20 |
| Long v. Barber Asphalt Co., 151 Ky., 1 | 12 |
| McManus v. Hornaday, 99 Ia., 507 | 12 |
| Matter of Riverside Park, 59 N. Y. App. Div., 603 | 33 |
| Martin v. District of Columbia, 26 App. D. C., 146 | 18 |
| Martin v. District of Columbia, 205 U. S., 135 | 18-19 |
| Merritt v. Port Chester, 71 N. Y., 309 | 12 |
| Nebraska, etc., Co. v. McKinley, etc., Co., 52 Neb., 410 | 28 |
| Pochila v. Ry. Co., 31 Tex. Civil Apps., 398 | 33 |
| R. R. Company v. Shipley, 72 Md., 88 | 29 |
| Security Trust & Safety Vault Co. v. Lexington, 203 U. S., 323 | 20 |
| Shannon v. Omaha, 72 Neb., 281 | 24 |
| Stine v. Wilkson, 10 Mo., 75 | 24 |
| St. Louis v. Koch, 169 Mo., 587 | 12 |

Page
Union Pacific Ry. Co. v. Montgomery, 49 Neb., 429.. 28
Washington v. Bassett, 15 R. I., 563..... 25
Weld v. Rees, 48 Ill., 428..... 31
Wight v. Davidson, 181 U. S., 37..... 31

STATUTES.

Act authorizing extension and widening of Colorado Avenue, etc., 37 Stat., 1..... 34
Code, D. C., Sec. 491-c ..... 35
Code, D. C., Sec. 491-g ..... 35
Code, D. C., Sec. 491-h ..... 36

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1914.

---

No. 163.

---

CUNO H. RUDOLPH, ET AL., *Petitioners*,

*vs.*

LYNCHBURG INVESTMENT CORPORATION, ET AL.

---

## BRIEF FOR RESPONDENTS.

---

### STATEMENT OF CASE.

This case comes before the Court upon a writ of certiorari to review a judgment of the Court of Appeals of the District of Columbia reversing an order confirming a verdict of a condemnation jury awarding damages and assessing benefits in connection with the extension and widening of Colorado Avenue and Kennedy Street, Northwest, under an Act of Congress approved June 30, 1911 (37 Statute at Large, 1).

The petitioners commenced the proceeding by filing their petition (Rec., pp. 1-6) in the Supreme Court of the District of Columbia on November 28, 1911, which said petition did not name either of the appellants, Lynchburg Investment Corporation or Holmes Central Realty Corporation, and did not seek the condemnation of any land owned by either of them. An order of publication was passed by the Court, and was published in the manner presently to be considered.

The Lynchburg Investment Corporation was wholly unaware of the pendency of the proceeding until after the trial had been completed, and the verdict of the jury had been returned (Rec., p. 28). Although the attorney for the Holmes Central Realty Corporation was present in court when the case was argued to the jury, its appearance was not entered in the cause until after the return of the verdict (Rec., p. 33).

At the trial, the petitioners and various property owners offered evidence touching upon the values of the lands to be condemned, and the extent of the benefits which would accrue therefrom (Rec., p. 33).

On March 8, 1912, the case was given to the jury and on April 4, 1912, its verdict was returned (Rec., p. 15).

On April 24, 1912, the Lynchburg Investment Corporation, appearing specially, filed its motion to vacate the verdict of the jury (Record, pp. 28-31), showing to the Court that it had not been made a party to the petition, which contained no prayer for process against it; that it had no notice of the pendency of the proceeding, either actual or constructive, unless such notice was to be implied from the fact of publication, which it charged was defective in various particulars specified in the motion and which will hereafter be fully considered; and also that, for such reasons, the publication and the proceeding did not constitute due process of law against it; that the petitioners, the Commis-

sioners of the District of Columbia, well knew the interests of the Lynchburg Investment Corporation in the said cause, by virtue of the fact that the said corporation had for many years paid taxes on large parcels of land in the vicinity of the land sought to be condemned; had for a long time appeared upon the assessment books of the District as such owner, and is still the owner of large holdings of real estate in the District of Columbia, a great many of which have been assessed for benefits in this proceeding, and are specifically enumerated in the said motion; that, though Section 491g of the Code expressly provides "where part of any lot, piece, parcel, or tract of land has been dedicated for the opening, extension, widening or straightening of a street, avenue, road or highway, the jury, in determining whether the remainder of said lot, piece, parcel or tract is to be assessed for benefits, and the amount of benefits, if any, to be assessed thereon, shall also take into consideration the fact of such dedication, and the value of the land so dedicated," and though the said Lynchburg Investment Corporation, by subdivision plat recorded in Book 36, page 2, of the records of the Office of the Surveyor of the District of Columbia, on the 10th day of September, 1909, had dedicated for the extension and widening of Colorado Avenue, Northwest, more than fifty thousand square feet of ground as shown by plat exhibit (Record, pp. 40-1), yet the fact of this dedication was not brought to the attention of the jury by the petitioners, who well knew the facts, and the Lynchburg Investment Corporation, by reason of its lack of notice of the proceedings, had no opportunity to do so, and in consequence the jury did not take into consideration the fact of such dedication, or the value of the land so dedicated, and were not instructed by the Court so to do; and also showing to the Court that the assessment of benefits against it was excessive (Record, p.

29). On the same day, the appellant Holmes Central Realty Corporation excepted to the said verdict (Record, p. 31), on the ground that the assessment of benefits against its property was excessive, and that the Court failed to instruct the jury as provided by Section 491g of the Code, that, in determining the benefits to be assessed, they should take into consideration the fact that parts of its lots or parcels had been dedicated for the extension and widening of Colorado Avenue and Kennedy Street and the value of said parts so dedicated as shown by plat duly recorded in the Office of the Surveyor of the District of Columbia, and printed in the record (Record, pp. 40-1), and upon each and every of the several grounds of the motion to vacate filed by the Lynchburg Investment Corporation.

On May 14, 1912 (Record, p. 32), the petitioners moved the Court to ratify and confirm the verdict of the jury notwithstanding the exceptions filed thereto, which motion was granted by the Court on May 23, 1912 (Record, p. 32).

In the bill of exceptions, the Court gave the full benefit to the Lynchburg Investment Corporation of each of the exceptions noted at the trial, without prejudice to any of its rights (Rec., p. 41).

This cause was then appealed to the Court of Appeals of the District of Columbia where the judgment of the trial court was reversed (Rec., pp. 51-2).

## Questions Submitted and Decided in the Court of Appeals.

It was urged in the Court of Appeals:

I. That the assessment of benefits against the lands of the respondents are excessive, unjust and unreasonable and that the jury were not governed by the provisions of Section 491g of the Code which required that in determining

the amount of benefits to be assessed upon the land of the respondents consideration should be given to the fact that they had already dedicated part of their lands for the extension and widening of said street and avenue.

II. That the notice given by publication failed to comply with the provisions of the statute and that the trial court was not invested with jurisdiction to impose a lien *in rem* upon the lands of the respondents.

III. That the burden of proof was upon the District to show the extent of special benefits that would result to respondents' property from the opening of the avenue and street in question.

Each and all of these propositions, which had been rejected by the trial court, were accepted as correct by the Court of Appeals. It would seem that if any of them is sound, the judgment of the trial court can not be sustained, and the action of the Court of Appeals in reversing that judgment must be approved.

## ARGUMENT.

### I.

THE ASSESSMENTS OF BENEFITS AGAINST THE LANDS OF THE RESPONDENTS ARE EXCESSIVE, UNJUST AND UNREASONABLE—A RESULT WHICH FOLLOWED THE DISREGARD BY THE COURT AND THE JURY OF THE PROVISION OF SECTION 491G OF THE CODE REQUIRING THAT THE DEDICATIONS AND THE VALUE OF LANDS DEDICATED SHALL BE TAKEN INTO CONSIDERATION IN ASSESSING BENEFITS.

It was chiefly upon this ground that the assessment of benefits upon the lands of the respondents was assailed in the Court of Appeals (Opinion, Rec., p. 50).

1. That grave injustice will result to the respondents if

the verdict should be permitted to stand appears from an examination of the record.

It was sought by the condemnation proceeding to acquire in the aggregate, for the widening and extension of both Colorado Avenue and Kennedy Street, a total of 78,603.92 square feet of land. A far greater area had been dedicated by the respondents for the purpose—in the aggregate 122,000 square feet; 68,574.8 square feet by the Lynchburg Investment Corporation, in the line of Colorado Avenue, or more than half the width of the Avenue through nearly the whole length of the extension; and, by the Holmes Central Realty Corporation, over 13,000 feet in the line of Colorado Avenue, and 39,304.40 feet in the line of Kennedy Street, or a very considerable part of Colorado Avenue and the whole of Kennedy Street from 14th Street to 16th Street, except the triangular corner of Lot 800 in Square 2719 condemned in these proceedings. (Exhibit, plats, Rec., pp. 40-1). It is apparent therefore that the respondents dedicated the principal part of the land required for the opening and extension of the street and avenue in question.

The following illustrations will be sufficient to make clear the nature of the injustice which the respondents contend they have sustained:

(a) Compare assessments on lots belonging to the Holmes Central Realty Corporation, numbered 1 and 4 to 11, in Square 2719, fronting on Colorado Avenue immediately to the south of Kennedy Street, as shown in the map or plat attached to the condemnation petition, marked "Exhibit D. C., No. 1" (Record, p. 6), with the assessments on lots 812, 813, 814, 818 and 819, in Square 2718, lying immediately to the south of these lots and also fronting on Colorado Avenue. The lots of the Holmes Corporation are 125 feet deep, each having an area of 3,125 square feet and a frontage on Colorado Avenue of 25 feet. The Corporation

had dedicated as part of Colorado Avenue the strip of land lying immediately in front of these lots, having a width of approximately 25 feet. All or practically all of the strip dedicated became parking and for all practical purposes, except that of being actually built upon, continued to remain part of said lots. By the proceeding in question a strip of land was condemned of approximately the same width, and which likewise became parking along Colorado Avenue and except for building purposes continued to remain part of the respective lots.

In other words, the strip condemned is of the same width and possesses exactly the same status as the strip which has been dedicated. The nine (9) lots of the Corporation mentioned were assessed with benefits in the sum of $202.25 each (Record, p. 25), which was at the rate of 6½ cents per square foot or $8.09 per front foot.

Lot 812, with an area of 21,602 square feet and a frontage of 100 feet, was awarded damages in the sum of $831.60 for the strip condemned for parking and was assessed benefits in the sum of $1,213.50, making the net assessment against the lot $381.90, considerably less than 2 cents per square foot and only $3.81 a front foot.

Lot 813, with an area of 24,616 square feet and a frontage of 100 feet, was awarded damages in the sum of $791.25 and assessed benefits in the sum of $1,213.50, making its total net assessment $422.25, less than 2 cents a square foot and only $4.22 a front foot.

Lot 814 (immediately adjoining lot 1 which was assessed at $202.25) with an area of 26,944 square feet and a frontage of 112.32 square feet, was awarded damages in the sum of $861.88 and assessed with benefits in the sum of $1,360, making the net assessment $498.12, or considerably less than 2 cents a square foot, and only $4.41 per front foot.

Lot 818, with an area of 8,164 square feet and a front-

age of 50 feet, was awarded damages in the sum of $445.86 and assessed benefits in the sum of $606.75, making the net assessment $150.89, or less than 2 cents per square foot, and only $3.01 per front foot.

It may be urged that we do not know that the jury assessed benefits on the total area of these deeper lots. Assuming, then, that they took the depth of the Holmes Corporation's lots, 125 feet, as the unit of assessment: while its lots were assessed 6½ cents per square foot, the net assessment on Lot 812 was only a fraction over 3 cents per square foot; on lot 813 it was but 3 1/3 cents; on lot 814 but 3½ cents, and on lot 818 less than 2½ cents. The same conditions run all through the verdict.

As the relative position of all these lots on Colorado Avenue is the same, no ground can be assigned or reasonable explanation given for imposing such a vastly greater burden upon the lots of the Corporation than was imposed upon the lots of the adjoining owners. The benefit of the opening of the avenue and having the parking in front of the lot would seem to be as great in one case as in the other. In fact, the taking of the strip by condemnation and converting it into parking would seem to be a lighter burden upon the lots of the adjoining owners, which are of considerably greater depth than the lots of the Corporation, than the burden upon the lots of the Corporation arising from the dedication of a strip of equal width for the same purpose.

(b) Compare also the assessments on the 3 lots belonging to the Lynchburg Investment Corporation, numbered 17, 18 and 19, in Square 2801, fronting on Colorado Avenue, with the assessment on parcel 86/13 belonging to S. W. Woodward, also fronting on Colorado Avenue and lying immediately to the north of the three lots. The three lots are of small area, each fronting 25 feet on Colorado Avenue. A comparatively broad strip of

land in front of each had been dedicated, most of which became parking. Parcel 86/14 contains 17.934 acres and a strip of land of the same width and to be used for the same purpose as that dedicated in the case of the three lots was taken in the condemnation proceeding. The three lots of the Corporation, 17, 18 and 19, are assessed, respectively, $40.05, $48.55, and $54.60 (Rec., p. 26); but with respect to the 17-acre parcel, the benefits are found to be exactly equal to the value of the land taken, notwithstanding the proportion of the condemned part to the whole tract is vastly smaller than the proportion of the parts dedicated to the areas of the three lots (Rec., pp. 20, 21, and 26).

(c) Compare also the assessments on lot 800, Square 2718, with the assessments on lot 2, immediately adjoining in Square 2719. In the case of lot 800, in Square 2718, a triangular area at the intersection of 16th and Kennedy Streets, was condemned for the opening of Kennedy Street. Of this condemned triangle, embracing 3,328 feet, more than half remained to lot 800 as parking, and the remainder, owing to its shape, could have been of comparatively little use, yet the owner was awarded damages in the sum of $2,828.80, or at the rate of 85 cents per square foot, and assessed benefits on the remainder of lot 800, containing 18,291 square feet, in the sum of only $571.00, making the net sum to be received by the owner $2,257.80, a large part of which under the award of the jury has to be paid by the respondents, one of which by its dedication of more than 37,000 square feet in the line of Kennedy Street between Colorado Avenue and 16th Street, alone, had made lot 800 a corner lot with direct communication with 14th Street. On the other hand, lot 2, Square 2719, the property of the Holmes Central Realty Corporation, immediately adjoining, is assessed net benefits in the sum of $600, as against the sum of $2,257.80 awarded as net damages in the case of lot 800.

(d) Lot 815, in Square 2718, as will appear by reference to the map, was used as an alley for the benefit of lots fronting on Colorado Avenue and on 16th Street, and before the dedication of Colorado Avenue opened into Piney Branch Road. Of this alley, 478 square feet was condemned as being within the lines of Colorado Avenue as extended, and thus transformed into an avenue. Because of this transformation it was awarded damages in the sum of $469.60, or nearly $1.00 per square foot, and no benefits whatever were assessed against it.

2. The provision of the Code, requiring dedications and the value of the lands dedicated to be taken into consideration, was disregarded in the assessment of benefits, and such disregard of the statutory provision has resulted in injustice and requires that the assessment of benefits be set aside.

Section 491g of the Code provides that

> "where part of any lot, piece, parcel or tract of land has been dedicated for the opening, extension, widening or straightening of a street, avenue, lot or highway, the jury, in determining whether the remainder of said lot, piece, parcel or tract is to be assessed for benefits and the amount of benefits, if any, to be assessed thereon *shall also take into consideration the fact of such dedication and the value of the land so dedicated.*"

This provision of law is designed to encourage dedications for openings and extensions according to the plan which has been adopted for the permanent system of highways for the District of Columbia. It is recognized that neighboring lands are benefited by the extension of the highway system, and the statute declares the policy that he who insists upon his land being taken for public use in extending streets shall not be favored above him who volun-

tarily dedicates land required for the purpose. It seeks to put all persons whose lands are used as part of a given extension in the position in which they would be if all the lands acquired were being taken in the condemnation proceeding. The provision is mandatory. The dedication and the value of the land dedicated "shall be taken into consideration in assessing benefits." It is a part of the "rule of apportionment among the parcels of land benefited" prescribed by the statute for the assessment of benefits, and the Commissioners were not at liberty to disregard it.

In *Dillon on Municipal Corporations* (5th ed.), Section 1402, p. 2450, it is said:

> "As the authority to levy taxes or to make local assessments does not * * * exist unless legislatively conferred, so it can be exercised no further than it is clearly given; and if the mode in which the authority shall be exercised is prescribed that mode must be pursued."

In *Hamilton on Special Assessments*, Sec. 559, it is said:

> "Proceedings for street improvements are purely statutory, and the rights and obligations of the parties to be affected thereby are to be determined by the terms of the statute. The right to an assessment, as well as the lien created thereby, exist only by force of the statute, and can be brought into existence only in accordance with its terms. Unless it affirmatively appear upon the face of the proceeding that every essential prerequisite of the statute conferring the authority has been complied with, such proceedings will be void. * * * That which the legislature has directed to be done under a statute delegating power to charge the property of individuals with the expense of local improvements, the courts can not declare immaterial, and none of the steps prescribed can be held

to be directory merely; and so, it can not be held that the omission to take any step does not affect the proceedings."

In *Fay vs. Macfarland*, 32 App. D. C., 295, the Court said:

> "The Commissioners are creatures of statute. They possess no implied powers. Their authority to act must be gathered from the express terms of the law granting it. Hence, *in any attempt to act under a statute granting authority, they must comply literally with its requirements.* Neither has the court any implied jurisdiction in the premises. *Every requirement of a statute conferring jurisdiction upon the Court to entertain a proceeding, providing a legal method of taking private property, must be complied with to the letter.*" (Italics ours.)

To similar effect are *Macfarland vs. Moore, Ibid.*, 213, and *Macfarland vs. Elverson, Ibid.*, 81, 85.

In *Lill vs. City of Chicago*, 29 Ill., 31, the court said: "It (the statute) has provided that the apportionment shall be made upon the lots which adjoin the street to be improved in proportion to the number of front feet of the lots. *If made* on other property or *on a different rule it can not be sustained, as the exercise of the power must strictly pursue the statutory authority.*" (Italics ours.)

See, also,

*Merritt vs. Portchester*, 71 N. Y., 309;
*McManus vs. Hornaday*, 99 Iowa, 507, 510;
*Barber Asphalt Paving Co. vs. Watt*, 51 La. Ann., 1345;
*Chamberlain vs. Cleveland*, 34 Ohio St., 551;
*Long vs. Barber Asphalt Paving Co.*, 151 Ky., 1;
*Ede vs. Cuneo*, 126 Cal., 167;
*St. Louis vs. Koch*, 169 Mo., 587;
*Lewis on Eminent Domain*, Secs. 387, 388.

As already shown, the respondent had dedicated a large part of the land required for the opening of the street and avenue and the petitioners in this proceeding, the Commissioners of the District of Columbia, had accepted their dedication.

The value of the land dedicated by the Lynchburg Investment Corporation, based on the lowest award made by the jury for land taken, about 30 cents per square foot, is $21,000, and on the same basis the land dedicated by the Holmes Central Realty Corporation has a value of $15,000. In the petition (R. p. 5) part of Section 491g is quoted as governing the award of damages and the assessments of benefits and in an instruction granted by the court (R. p. 34) at the request of the petitioners, the language of part of said section is embodied, but the provision which was vital to the respondents was in both instances strangely omitted. Could any other result be expected than that the verdict would be unjust and unreasonable as to them? Not only were the jury neither informed of the fact nor instructed as to the legal effect of such dedication, but the illustrations cited above, especially the comparison of the assessment of benefits on the lots fronting on Colorado Avenue, show conclusively that the jury did not take into consideration the dedications that had been made, nor could they have done so. It seems impossible to doubt that the effect of the proceeding was to deprive the respondents of credit for the large donations of land which they had made and to vastly increase the burdens placed upon them as compared with the burdens placed upon the adjoining land owners.

May the Commissioners and the court legally proceed to assess benefits against the lands of the respondents in express violation of the commands of the statute? Must not the mode prescribed by the statute for the condemna-

tion be pursued? The only answer that it would seem could possibly be made to this contention is that the respondents ought to have been in court and protected their own interests. The statute, however, while it gives opportunity for those who may receive the notice to appear, does not require them to do so. As a matter of fact it is not to be expected that all parties will appear; and the Lynchburg Investment Corporation could not have participated in the trial, since it was not aware of the pendency of the proceeding. In a case like the present it might well happen that benefits might be assessed against persons who would not expect such assessments to be made. The statute, therefore, wisely provides that exceptions may be filed to the verdict and declares that the court shall vacate it and set it aside when unjust and unreasonable. (Section 491h, Code D. C.)

Moreover, in the present case it might well have been expected that the Commissioners would allow no unjust advantage to be taken of the respondents. They had contributed much of the land necessary to the opening and extension of the streets in question and the Commissioners had accepted their contribution. Were the Commissioners not bound by the mandatory provisions of the statute and by every consideration of equity and fair dealing to place the facts fully before the jury? The language of the statute is not that the jury *may*, but that they "*shall* take into consideration the fact of such dedication, and the value of the land so dedicated," and the declaration is the embodiment of a principle of plain equity and justice. Such being the statutory mandate, it would seem that the duty to take the action necessary to see that the statute is complied with rests upon the petitioners.

In *Brown vs. Macfarland*, 19 App. D. C., 525, the court had under consideration a statute providing that if the

proper authorities or any owners of lands should be dissatisfied with a verdict rendered by a condemnation jury, the marshal should be ordered to summon a second jury. Land owners having filed exceptions, but not having prayed for the summoning of the second jury, the court overruled the exceptions and confirmed the verdict. This order was reversed, this court saying (p. 530):

> "It is argued that the appellants did not, in terms, demand that the second jury of twelve should be ordered, and therefore the court was justified in ratifying the verdict of seven. But it must be borne in mind that it was not the duty of the appellants, as owners of land proposed to be condemned, to demand a summoning of a second jury. The statute does not require it of them. That is the duty of the authorities authorized to institute and prosecute the proceedings of condemnation to completion. The owners of the lands proposed to be condemned are placed in the position of defendants or opponents of the proceeding of condemnation; and, consequently, all affirmative acts prescribed by the statute in perfecting the proceeding, must be shown to have been complied with by the parties authorized to take and prosecute the proceeding. *The whole proceeding is strictly statutory, and it must be affirmatively shown that all the provisions of the statutes that apply to the proceedings have been substantially complied with.* Otherwise the whole proceeding would be void and without effect." (Italics ours.)

So, here, to place before the jury the facts in connection with the dedication of land for the opening, widening, and extension of Colorado Avenue, which had been made by the respondents, was the duty of the authorities authorized to institute and prosecute the proceedings of condemnation to completion.

Although it appears that the attorney of the Holmes Realty Corporation was present in court when the case was argued to the jury, neither of the appellants entered an appearance or took any directing part in the proceeding until after the rendition of the verdict, and the Lynchburg Investment Corporation had no notice of its pendency until that time (Record, p. 29).

The case is not analogous to a proceeding brought by one party against another in which the party proceeded against is expected and required to protect his own interests and if he fails to do so may not be heard to make any objection which might have been made upon the trial of the case. On the contrary, the respondents against whom the said assessments were made were not parties to the record. The Lynchburg Corporation knew nothing of it, and the Holmes Central Realty Corporation may reasonably have relied upon the proceedings being conducted in accordance with the statute. They were not required to come into court at the beginning of the proceedings, and, without regard to whether they appeared or not, the authorities making the assessment were compelled to proceed as the law directed.

In *Brandenburg vs. District of Columbia*, 26 App. D. C., 140, 145, the Court said:

> "We do not question that all statutory requirements in proceedings of this nature must be observed, and that any failure to observe them can be availed of at almost any stage of the proceeding."

3. But even if a violation of a mandatory provision of a statute were not in issue, the Court of Appeals had authority under its rules to notice plain errors, even without their being assigned. *Columbia Heights Realty Co. vs. Macfarland*, 217 U. S., 547. And the brief for the petitioners

concedes that plain error of law, or grave error of fact appearing from the verdict, would justify a review of the trial court's action.

In the present case it is clear there was a plain mistake made as to the law applicable to assessments. It is believed to be equally clear that the assessment is not just or reasonable as to the respondents. Certainly it can not be said that the plain mistake made as to the law has not affected the verdict.

In *Berdel vs. Chicago*, 217 Ill., 429, the condemnation jury in assessing benefits for the widening of a street for the extension of a market place, where 35 feet were taken from each abutting lot, assessed back upon the remainder of each lot throughout the entire length of the improvement the amount allowed as compensation for that part of the lot taken. The jury in its verdict had disregarded the fact that the lots were differently situated and that some already enjoyed the benefits of the market place to a great degree. The Court held that the plan for assessing benefits adopted by the jury was unjust and the verdict palpably wrong. The judgment of the Court below affirming the verdict was accordingly reversed.

In *Espert vs. Chicago*, 201 Ill., 264, the statute made it the duty of the commissioners in assessing damages and benefits for opening or widening a street, a part of which had been donated, to take such donation into consideration, and in their report to allow or disallow, *in their discretion*, the value of the land donated as an off-set to benefits. The commissioners allowed no credit for the dedications. The Court said:

> "Under this state of facts we hold that appellant was entitled to have the question of this dedication taken into consideration in fixing the amount that he was to be assessed for the improvement. While the

> statute says that the Commissioners may, in their discretion, make such allowance, it also says that that discretion shall be subject to review by the courts, and therefore can not mean that this exercise shall be an unreasoning or unreasonable one, or a total failure to even consider the matter."

In *Brandenburg vs. District of Columbia*, 26 App. D. C., 140, and *Martin vs. District of Columbia*, 26 App. D. C., 146, the statute under consideration provided that, after appraising the damages, the jury should "apportion an amount equal to the amount of said damages so ascertained and appraised as aforesaid," including fixed pay for the marshal and jury, "according as each lot or part of lot in said square may be benefited by the opening, widening, extending or straightening of said alley," with certain deductions. In that case the appellants were owners of land which was taken, and they had been actually served with notice. The Court of Appeals said in the Brandenburg case at p. 146:

> "The appellant, having been served with due notice, had an opportunity to be heard on the subject of damages and benefits to his lots, and can not now be heard to insist that the taxes complained of should be annulled because the jury failed to make correct assessment and apportionment, whatever his rights may be to attack the constitutionality of the act and the preliminary steps leading up to such proceedings before the jury."

This Court, however, in *Martin vs. District of Columbia*, and *Brandenburg vs. District of Columbia*, 205 U. S., 135, reversed the decision of the Court of Appeals on the ground that with reference to the assessment of damages the jury

did not assess damages as the statute directed. The Supreme Court said (p. 140):

> "It is clear, however, from the petitions and the returns that the jury did not administer the statute in the way in which we have determined that it should be read. About one-fifth of each lot was taken, and was valued at $92 and $75 respectively. That would give a value of $368 and $300, at the most, to the remaining portions, before the improvement was made. These lots were assessed $650 less said $92, or $558, and $550 less said $75, or $475. It is not improbable that the widening of an alley could have nearly trebled the value of each lot. We think it apparent, as was assumed by the Court of Appeals, that the jury understood their duty to be to divide the whole cost among the land owners, whether the benefit was equal to their share of the cost or not. * * * *There is nothing in the record sufficient to show that the jury took a different view, or that they limited the assessment to the benefit actually conferred on these lots.* For this reason the assessment must be quashed." (Italics ours.)

The reasoning of this opinion, it is believed, is conclusive in the case at bar. The petition and the court's charge to the jury show that the statutory direction that the value of the land they had dedicated was to be considered in the assessment of benefits upon their lots was entirely ignored. As in the Martin and Brandenburg cases, there is nothing in this record sufficient to show that the jury took a different view as to assessing benefits upon respondents' land from that set out in the petition and in the court's instructions, or that they took into consideration the fact of such dedications and the value of the land so dedicated. On the contrary, the verdict of the jury in the respects heretofore pointed out shows beyond question that in assessing benefits the dedi-

cations made by the respondents were not taken into consideration. We believe, therefore, it must follow in this case, as in the Martin and Brandenburg cases, that the assessment must be set aside.

II.

THE NOTICE AS PUBLISHED WAS NOT SUFFICIENT TO AUTHORIZE THE COURT TO MAKE THE ASSESSMENT OF BENEFITS.

It is well settled that special assessment proceedings, in which the land owner assessed is not given notice and afforded a hearing prior to the imposition of the assessment, are null and void.

> "Where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making its assessment and apportionment, due process of law requires that at some stage of the proceedings before the tax becomes irrevocably fixed, the taxpayer shall have an opportunity to be heard, of which he must have notice, either personal, by publication, or by a law fixing the time and place of the hearing." *Londoner vs. Denver*, 210 U. S., 373, 385-6.

See, also:

*Central of Georgia Railway vs. Wright*, 207 U. S., 127, 138;
*Security Trust & Safety Vault Co. vs. Lexington*, 203 U. S., 323, 333;
*Hibben vs. Smith*, 191 U. S., 310;
*Didden vs. Harrington*, 189 U. S., 255;
*Goodrich vs. Detroit*, 184 U. S., 432;

It is likewise well settled that statutes authorizing proceedings by publication must be strictly and literally pur-

sued; else, jurisdiction does not exist. Such statutes are also strictly construed.

This Court has said:

> "No principle is more vital to the administration of justice, than that no man shall be condemned in his person or property without notice, and an opportunity to make his defence. And every departure from this fundamental rule, by a proceeding *in rem*, in which a publication of notice is substituted for a service on the party, should be subjected to a strict legal scrutiny. Judisdiction is not to be assumed and exercised in such cases upon the general ground, that the subject-matter of the suit is within the power of the Court. This would dispense with the forms of the law, prescribed by the legislature, for the security of absent parties. The inquiry should be, have the requisites of the statute been complied with, so as to subject the property in controversy to the judgment of the court, and is such judgment *limited to the property named in the bill.* If this can not be answered in the affirmative, proceedings of the Court beyond their jurisdiction are void." Boswell's Lessee vs. Otis, *et al.*, 9 How., 336, 350.

> "The purpose of notice is to secure to the owner the opportunity to protect his property from the lien of the proposed tax or some part thereof. In order to be effectual it should be so full and clear as to disclose to persons of ordinary intelligence in a general way what is proposed. If service is made only by publication, that publication must be of such a character as to create a reasonable presumption that the owner, if present and taking ordinary care of his property, will receive the information of what is proposed and when and where he may be heard." Bellingham & Co. vs. New Whatcom, 172 U. S., 314, 318.

See, also:

*Galpin vs. Page*, 18 Wall., 350, 368, 369, 372;

*Guaranty Trust Co. vs. Green Cove Railroad,* 139 U. S., 137, 148;
*Dick vs. Foraker,* 155 U. S., 404, 413;
*2 Cooley on Taxation,* 929-30.

It will be observed that neither the condemnation petition nor the notice or order of publication names, mentions or refers to either of the respondents, or any of the property of either of them. No limit of territory was fixed within which benefits were to be assessed, but the entire amount of damages plus the costs and expenses of the proceeding were to be assessed upon the abutting land and all other pieces and parcels of land in the District of Columbia, which the jury "might find" would be benefited. No notice of any kind was served upon either of the respondents. They had no actual notice of the proceeding and no consructive notice unless the same arose from the publication of the notice, in which neither they nor their property was mentioned; and none of the property of either of them abutted upon the strips condemned.

It is further to be observed, that Section 491c of the Code specifically provides that "the said Court shall cause public notice of not less than twenty days to be given of the institution of such proceeding by advertisement in three daily newspapers published in the District of Columbia." The notice and order of publication (Record, p. 7) provides that a copy of the "notice and order be published once in the *Washington Law Reporter* and on six secular days in the *Washington Evening Star*, the *Washington Herald* and the *Washington Post*, newspapers published in the said District, commencing at least twenty days before the said 9th day of January, A. D., 1912." The publication so provided for and ordered was made and completed within a period of nine days, between November 29th and December 8th, the last publication having been made 32 days prior to the return

day, January 9th: and no publication whatever was made within twenty days of that day (Record, pp. 8 to 14).

If the entire publication can be made twelve days more than twenty days before the return day, why not a month, or a year, or many years in advance of that day? Who shall set the limit?

What did Congress mean by "public notice of not less than twenty days * * * by advertisement in three daily newspapers"? It was careful to provide that the notice should be "public," to measure the length of the notice by "days," and to prescribe "daily" newspapers as the medium of publication. Does this mean that the Court may fix a return day, a month, six months, or a year hence, direct publication once or a half dozen times within the first week or ten days, and then leave the matter to rest dormant until the return day? The contention of the petitioners, followed to its logical conclusion, amounts to the statement that a single publication, made more than twenty days before the return day, satisfies the statute. Indeed, they frankly so contend. Analysis of the proposition will, it is believed, reveal its unsoundness upon authority and principle alike.

It is submitted, even though it should be considered that a requirement of so many months or so many weeks' notice is complied with by publication once in each month or week, as the case may be, one publication, at the beginning of the period would be clearly insufficient, and that, when it is required that notice of so many days be given, particularly when the notice is to be "public" and to be given in "daily" newspapers, it must be given on each day from the beginning to the end of the required period of time.

In *Delogny, et al., vs. Smith, et al.*, 3 La., 418, 423, the statute required that property seized for taxes, be sold after advertisement during three months in two newspapers, both in the French and English languages. The sale in question

took place on April 7th. In one of the newspapers, the French advertisement was inserted three times in December, three times in February and four times in March, omitting altogether the month of January. Holding this publication insufficient, the Court said:

> "The law does not say whether the three months in which the sale should be advertised are the three months immediately preceding the sale. But we think that such is the sound construction. Otherwise the corporation might give the notice at any time they pleased, and at so great an interval of time as to render nugatory nearly all the objects to be obtained by advertising. Neither does the law say whether the months are calendar months, or whether the advertisements must be inserted in a newspaper for a space of time equal to three months from the first notice to the day of sale, or three of the months designated in our calendar. Taking either as the true construction, the law was not complied with. The advertisements made in December can not, in our judgment, aid the proceedings. There must be the regular notification in two of the newspapers of the city, both in the French and English languages, for three months previous to the sale. The same number of advertisements, or more, in other months, will not satisfy the law."
>
> See also *Shannon vs. Omaha*, 72 Neb., 281.

When publication is made in a monthly paper, the first publication gives notice from the time of its issue until the next issue of the paper appears, and, consequently, the publication must be made every month in such paper, or in every issue of it. For like reasons, publications, when given in a weekly newspaper, must be given every week, or in every issue of the paper which appears during the interval; and publication in a daily paper must be given every day, or in every issue of the paper.

In *Stine vs. Wilkson, et al.*, 10 Mo., 75-96, the require-

mt of a deed of trust that 20 days previous notice of the tie and place of sale thereunder be given by publication, wa held to necessitate 20 days continuous publication.

> "Would one publication of a notice by a sheriff of an intended sale of real estate under execution, made in a newspaper 20 days before the day of sale, be held to be a compliance with the requisition of the statute, which directs him to give 20 days previous notice of the time, etc., by advertisement in some newspaper printed in the county, etc.? We apprehend that such is not the general understanding nor the practice in the country—but that such notices are *continued to be published* until the day of sale. * * * The length of time when the notice was to be given, prior to the day of sale being fixed by the parties, shows that the intermediate time was intended to be occupied by such notice."

In *Washington vs. Bassett, et al.*, 15 R. I., 563, a mortgage authorized sale of the mortgaged premises upon default, "first giving 20 days' notice of such sale in some one of the public newspapers printed in said city of Providence." The sale took place August 12, 1885. The notice was published in the "Evening Mail" seven times, on July 22, 25 and 29, and on August 1, 5, 8, and 11. The Court said:

> "The question is, whether such a publication of the notice satisfies the requirement of the power. We do not think it does. The evident purpose of the requirement is to secure ample notice of the sale, for the mutual advantage of the mortgagor and mortgagee. The mortgagee is also to select the newspaper in which he will give the notice; but the extent of the notice is definitely expressed and it must be 'twenty days' notice.' We think the fair and natural interpretation of that phrase is that the notice is to be continuous, in the paper selected, for twenty days.

> The defendants contend that, inasmuch as the notice covered a period of twenty days, it was 'twenty days' notice.' But if seven insertions in a daily paper, covering the time, is to be held equivalent to twenty days' notice, why would not two, say on the first and last days of a period of twenty days, or even one twenty days before the sale? If anything less than a continuous notice is sufficient, we do not see why one or the other of these would not also be sufficient. The defendants say that even this complies with the literal construction of the power; but that is not enough, if the construction be crafty or technical. Such powers should be construed as people generally, who have to do with them, would be likely to understand them; and we think that the use of the word 'days' would suggest, to the ordinary mind, a continuous daily notice, if it be in a daily paper. * * * In Harris, Petitioner, 14 R. I., 637, this Court held that where the statute requires a notice to be published, 'in some public newspaper for four successive weeks,' it is enough if the notice be published weekly, even though it be in a daily paper. See, also, Thurston vs. Miller, 10 R. I., 358. There are numerous cases to this effect, and they proceed upon the principle that, where the period is a certain number of weeks, such a notice is continuous from week to week, which is all that is required. Upon the same principle we must conclude that, where the period is a certain number of days, the notice must be continued from day to day, upon such days as the paper is published."

In *Armstrong, et al., vs. Scott*, 3 Greene (Ia.), 433-34, sale under a deed of trust was enjoined for insufficient notice, the Court saying:

> "The deed of trust provides that the trustee shall first give 30 days' notice, etc., in some newspaper published in the city of Burlington. But one publication was made, and the question is, whether the trustee was

not bound to continue the publication in each weekly number of the paper until the thirty days had expired? This we believe to have been the intention of the parties. The notice should not only have been published thirty days before the day of sale, but such publication should have been continued. Suppose the notice had only appeared in one copy of the paper, and suppressed in all the other issues, would it have been, in contemplation of law, a newspaper notice? And yet a notice 30 days prior to the time of sale might appear to have been given. The object of all such notices is to advise the public, and when the law requires notice to be published for a certain number of weeks before sale shall take place, it does not merely mean that after the first publication the officer shall be permitted to sell, if the necessary time has intervened. It is as indispensable that the publication shall be continued, as that the required time shall elapse."

Thus in *Leffler vs. Armstrong*, 4 Iowa, 482, 487, after approving *Armstrong, et al., vs. Scott, et al.*, 3 Greene, 433, the Court said:

"The notice, as we have before substantially stated, was circulating, and being published to the public and the world in legal contemplation, as much and effectively on each day, hour and minute after one publication, *and before the succeeding one*, as it was at the instant of time when the paper was issued or delivered to its readers. And yet it would not do to hold that *one* publication, thirty days prior to the sale, would be sufficient; for the language used, as well as reason and good sense, would dictate a continuous or successive publication—in those modes of repetition which the subject-matter would allow. And, therefore, in this case (there being no charge or pretense that a daily paper was then issued in Burlington) it is only necessary to say that successive publications in the weekly issues were required."

The petitioners are in error, therefore, when the say "There was no indication in either of these cases that no daily paper was available."

In *Union Pacific Railway Co. vs. Montgomery, et al.*, 49 Neb., 429, 432, the requirement was that the publication be "for at least one week," and the Court said:

> "The certificate of the clerk shows that it was published but once in a daily paper. The publication having been made in a daily paper, it should have been continued in each issue thereof for one week. One insertion alone did not meet the requirements of the statute. Had the paper in question been published weekly, then one insertion therein, doubtless, would have been sufficient."

In *Nebraska, &c., Co. vs. McKinley, &c., Co.*, 52 Neb., 410, 412-13, cited and quoted by the petitioners in their brief in the lower court, it was said:

> "An inspection of the cases cited, together with others cognate thereto, will disclose that it has always been the opinion of this Court, and we have no doubt that such is the correct view, that a publication is not to be considered as an instantaneous act, but endures through the period elapsing between the issuing of one number of the paper selected and the issuing of the next. Thus, if the law required publication for one week, a publication in a weekly newspaper issued on January 19 would suffice for an event to take place January 26. To constitute two weeks' publication the notice would have to be repeated in the issue of the latter date, and so if time were designated in days instead of weeks."
>
> "Where the publication is ordered in a daily paper, the presumption would be the advertisement should be published until the day of sale in each edition of the paper, unless otherwise directed." *Allen, et al., vs. Kerr, et al.*, 13 Lea (Tenn.), 256.

See, also, 29 Cyc., 1121.

Numerous cases are cited in support of the petitioners' contention that, under this statute, one publication is sufficient, provided it be made at least twenty days before the return day. It is believed that such cases are opposed in principle to the better reasoned authorities, and that analysis will show that many, if not most of them, do not support the proposition contended for.

In *Aldis vs. Park Commissioners,* 171 Ill., 424, 432, the statutory requirement, as stated in the excerpt quoted by the petitioners, was that "at least ten days' notice" of the application "shall be published in one or more newspapers published in the county * * * at least ten days before the time named." The application of the construction placed upon this statute, to the one at bar, is not apparent.

*Central Savings Bank vs. Baltimore,* 71 Md., 515, presented an Act of the Assembly, not relating to the giving of notice to parties to a condemnation proceeding, but only to notice of an application for the passage of an ordinance for the opening of a street, and the question now under consideration was not raised in that case. "The notice was published a number of times, but the interval between the last publication and the passage of the ordinance was less than sixty days," and the contention was, the statute requiring sixty days' notice, that the entire publication should be made at least sixty days before the passage of the ordinance.

*Railroad Company vs. Shipley,* 72 Md., 88, is even less to the point. That was an action of assumpsit, by an examiner who had, in accordance with the statute, given notice of the proceeding, and the suit was to recover an assessment against the railroad property. The statutory requirement was that he should give "at least ten days'

notice by publication in one or more newspapers published in Baltimore County, and in one newspaper of general circulation published in Baltimore City" of the application to open the street; that he should give "fifteen days' notice in one or more newspapers published in Baltimore County, and one or more newspapers published in Baltimore City," of the time and place for examining the statement, plat, etc., which had been filed and of making objections thereto; and that he should "notify the persons interested, by an advertisement, to be inserted once a week for three successive weeks, in one or more newspapers in Baltimore County, and in one or more newspapers of general circulation published in Baltimore City, that said statement, plat, etc., had been deposited with the County Commissioners." The first of these notices was published once, in a Baltimore City paper and in a Baltimore County paper; the second notice was published twice in a Baltimore City paper and once in a Baltimore County paper; and the third notice was published once a week for three successive weeks in a Baltimore City paper and a Baltimore County paper. There was no requirement here that any of the notices be published in a daily paper, and no point appears to have been raised in that regard. It may indeed well be, that under a statute such as this, specifically prescribing three publications of one notice, and omitting to state the number of publications to be made of the other notices, that a single publication of them is sufficient. And this was all the court held.

In *Drainage District vs. Campbell*, 154 Mo., 151, the Court only held that a requirement of fifteen days' notice is satisfied by publishing the notice in three successive issues of a weekly newspaper, the first notice being published seventeen days before the time fixed. It did not hold one publication sufficient, or that three weekly publications in a daily newspaper would suffice.

In *Weld vs. Rees*, 48 Ill., 428, and in *Jenkins vs. Pierce*, 98 Ill., 646, the language was "after publishing a notice in a newspaper published in the City of Chicago ten days before the day of such sale," and in the former case, which was approved and followed in the latter, it was said: "The language employed in this case would seem to have been employed to exclude the idea that notice should be continuous."

In *Wight vs. Davidson*, 181 U. S., 371, an excerpt from page 382 of which report is quoted by the petitioners, the statute required personal notice of the institution of the proceedings to be served upon the property-owners, including appellees. Such notice was served, and in addition the order of confirmation *nisi* was published and also served personally. This court accordingly said that if the appellees, with such notice, did not see fit to protect their own rights they could not be heard to complain because, in addition to personal service, notice had also been given by publication. But, at p. 381, the court further said that when the Legislature, instead of determining the matter of benefits for itself, submits "these questions for inquiry to a commission * * * the inquiry becomes in its nature judicial in such a sense that the property-owner is entitled to a hearing, or to notice or an opportunity to be heard."

The other cases cited by the petitioners are no more to the point, and in no instance is any principle stated or reason given in any one of the cases so cited.

It is also to be observed that the order itself was not complied with. The order directed its publication "on six secular days" in three newspapers. The proof of the publication in the *Evening Star* shows that it was published on November 29 and on December 1, 2, 4, 5 and 6, 1911 (Record, p. 12). December 2d was Saturday, and, as is well known, and as appeared from the motion to vacate the

verdict (Record, p. 29), the *Evening Star* was published on the afternoon of that day, and consequently on a legal holiday, a *dies non*, and not on a secular day, as required by the order. Sec. 1389 of the Code provides that "every Saturday after twelve o'clock noon shall be a holiday in the District for all purposes." The publication in the *Evening Star* on Saturday afternoon not having been made on a secular day, but on a holiday, the order of the court would seem not to have been complied with.

The notice as published, is therefore believed not to have been sufficient to invest the court with authority to assess benefits upon the lands of the respondents.

## III.

### The Burden of Proof Was Upon the District to Show the Extent of Special Benefits.

The District Court refused to give the following instruction:

> "The jury are instructed that the burden of proof rests upon the District of Columbia to show to the satisfaction of the jury the extent of the special benefits which will directly result to property from the extension and widening of Colorado Avenue and Kennedy Street, Northwest, as proposed herein" (Rec., p. 34).

The Court of Appeals, holding it unnecessary under the circumstances to determine whether the refusal was reversible error, expressed the view that the instruction should have been granted (Rec., pp. 49-50). While citation of authorities scarcely seems necessary, the following cases are referred to in addition to those cited in the opinion, as supporting the views of the Court of Appeals:

*Bennett vs. Woody*, 137 Mo., 377, 383-4.
*Pochila vs. Railway Co.*, 31 Tex. Civ. App., 398.
*Matter of Riverside Park*, 59 N. Y. App. Div., 603, 606, affirmed 167 N. Y., 627.
*Hamilton on Special Assessment*, sec. 762.

Although the Court of Appeals considered it unnecessary to hold that refusal to grant the instruction to be reversible error, it seems clear that the refusal could not be a harmless error.

> "While this Court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party."
> *Vicksburg & Meridian Railroad vs. O'Brien*, 119 U. S., 99, 103;
> *Menia vs. Oliver*, 148 U. S., 664, 673;
> *Boston & Albany Railroad vs. O'Rielly*, 158 U. S., 334;
> *Crawford vs. United States*, 212 U. S., 183, 203.

It is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

JOSEPH W. COX,
W. C. SULLIVAN,
*Attorneys for Respondents.*

J. J. DARLINGTON,
A. E. L. LECKIE,
JOHN A. KRATZ,
*Of Counsel.*

## APPENDIX.

### THE ACT AUTHORIZING THE CONDEMNATION (37 STAT. AT L. 1).

*"An Act to Authorize the Extension and Widening of Colorado Avenue, Northwest, from Longfellow Street to Sixteenth Street, and of Kennedy Street, Northwest, through Lot numbered eight hundred, Square numbered twenty-seven hundred and eighteen.*

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, That under and in accordance with the provisions of sub-chapter one, of chapter fifteen, of the Code of law for the District of Columbia, within six months after the passage of this Act, the Commissioners of the District of Columbia be, and they are hereby, authorized and directed to institute in the Supreme Court of the District of Columbia a proceeding in rem to condemn the land that may be necessary for the extension and widening of Colorado Avenue northwest from Longfellow Street to Sixteenth Street with a width of one hundred and twenty feet, according to the plan for the permanent system of highways for the District of Columbia, and of Kennedy Street northwest through lot numbered eight hundred, square twenty-seven hundred and eighteen, with a width of ninety feet: *Provided, however*, That the entire amount found to be due and awarded by the jury in said proceeding as damages for, and in respect of, the land to be condemned for said extension and widening, plus the costs and expenses of the proceeding hereunder, shall be assessed by the jury as benefits.

"Sec. 2. That there is hereby appropriated, out of the revenues of the District of Columbia, an amount sufficient to pay the necessary costs and expenses of the condemnation proceeding herein provided for and for the payment of the

amounts awarded by the jury as damages, to be repaid to the District of Columbia for the assessments for benefits and covered into the Treasury to the credit of the revenues of the District of Columbia.

"Approved, June 30, 1911."

PROVISIONS CONTAINED IN SUB-CHAPTER 1 OF CHAPTER 15 OF THE CODE OF THE DISTRICT OF COLUMBIA.

"Sec. 491c. The said court shall cause public notice of not less than twenty days to be given of the institution of such proceeding, by advertisement in three daily newspapers published in the District of Columbia, which notice shall warn and require all persons having any interest in the proceeding to appear in court at a day to be named in said notice, and to continue in attendance until the court shall award damages and the assessment of benefits by the jury herein provided for; and in addition to such public notice said court shall cause a copy of said notice to be served by the United States marshal for the District of Columbia, or his deputies, upon such owners of the land to be condemned as can be found by said marshal, or his deputies, within the District of Columbia, and upon the tenants and occupants of the same. The said court shall appoint a guardian *ad litem* for any person interested in the proceeding who may be under disability."

"Sec. 491g. That of the amount found to be due and awarded as damages for and in respect of the land to be condemned for said opening, extension, widening, or straightening, plus the costs and expenses of the proceeding, such amount shall be assessed by the jury as benefits, and to the extent of such benefits against the lots, pieces, or parcels of land on each side of the street, avenue, road, or highway to be opened, extended, widened, or straightened, and against any and all other lots, pieces, or parcels of land

which the jury may find will be benefited by the opening, extension, widening, or straightening, as the jury may find said lots, pieces, or parcels of land will be benefited; and in determining the amounts to be assessed against said lots, pieces, or parcels of land the jury shall take into consideration the respective situations and topographical conditions of said lots, pieces or parcels of land, and the benefits and advantages they may severally receive from the opening, extension, widening, or straightening of the street, avenue, road, or highway. And where part of any lot, piece, parcel, or tract of land has been dedicated for the opening, extension, widening, or straightening of the street, avenue, road, or highway, the jury, in determining whether the remainder of said lot, piece, parcel, or tract of land is to be assessed for benefits, and the amount of benefits, if any, to be assessed thereon, shall also take into consideration the fact of such dedication and the value of the land so dedicated. If the total amount of the damages awarded by the jury and the costs and expenses of the proceeding be in excess of the total amount of the assessments for benefits, such excess shall be borne and paid by the District of Columbia.—Act of February 25, 1907 (37 Stat., Part I, p. 930)."

"Sec. 491h. The said court shall hear and determine any objection and exceptions that may be filed to any verdict of the jury and shall have power to vacate and set any verdict aside, in whole or in part, when satisfied that it is unjust or unreasonable, in which event the court shall cause a new jury of five experienced, judicious, disinterested men, who shall be freeholders in the District of Columbia, not related to any person interested in the proceeding and not in the service or employment of the District of Columbia, or of the United States, to be summoned, who shall proceed to ascertain the damages or assess the benefits, or both, as the case may be, in respect of the land as to which the verdict may be

vacated, as in the case of the first jury: Provided, That if vacated in part, the residue of the verdict as to the land condemned or assessed shall not be affected thereby: And provided further, That the objections or exceptions to the verdict shall be filed within twenty days after the return of the verdict to the court."

# NEWMAN ET AL., COMMISSIONERS OF THE DISTRICT OF COLUMBIA, *v.* LYNCHBURG INVESTMENT CORPORATION.

CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 163. Argued March 3, 1915.—Decided March 22, 1915.

The fact that a statute requiring notice has been construed in a number of cases in the jurisdiction as meaning the method used in the case is an important element to be considered by the courts in construing it.

The notice required by § 491 c of subd. 1 of Ch. 15 of the Code of the District of Columbia requiring public notice of not less than twenty days to be given of the institution of a condemnation proceeding construed as meaning that notice shall be given twenty days before the time set and not that it shall be given on twenty distinct days before that time.

This court assumes that a special act directing condemnation proceedings adjudicates the benefits as a whole and leaves open all questions as to any particular lots. It is error for the trial court not to instruct that the burden is on the District to establish by preponderance of evidence the extent of special benefits accruing to a particular parcel.

The jury in a condemnation proceeding should be instructed as to their duty in regard to considering dedications of land taken.

Assessments for benefits cannot be separated, and error in charging in that respect cannot be corrected, by reversal of the judgment in part.

Although the intermediate appellate court may have erred in basing its reversal of the lower court on the matter of most general importance in a case in this court on certiorari if its judgment was correct on other points it should be affirmed.

40 App. D. C. 130, affirmed.

THE facts are stated in the opinion.

*Mr. Conrad H. Syme* and *Mr. James Francis Smith* for petitioners:

The notice as published satisfied the requirements of the law.

In regard to dedications no instructions were requested nor exception taken. Therefore the judgment should not be reviewed. *Met. R. R. Co.* v. *District of Columbia*, 195 U. S. 332.

The reasonableness of the verdict is a question for trial judge and is not reviewable. *Col. Heights Realty Co.* v. *McFarland*, 217 U. S. 547, 560.

No injustice is shown.

The burden of proof is not upon the petitioners. *Bauman* v. *Ross*, 167 U. S. 548; *Wight* v. *Davidson*, 181 U. S. 371; *Henderson* v. *Macfarland*, 33 Apps. D. C. 317; *Baltimore* v. *Smith*, 80 Maryland, 458.

The vacation of verdict *in toto*, notwithstanding two parties only excepting, was error. *Briscoe* v. *MacFarland*, 32 App. D. C. 167; § 491h of D. C. Code.

In support of these contentions see also *Aldis* v. *South Park*, 171 Illinois, 424; *Allen* v. *Kerr*, 13 Lea (Tenn.), 256; *Andrews* v. *Ohio & Miss. Ry.*, 14 Indiana, 169; *Armstrong* v. *Scott*, 3 Greene (Iowa), 433; *In re Bassford*, 50 N. Y. 510; *Boswell* v. *Otis*, 9 How. 336, 350; *Bouldin's Case*, 23 Maryland, 328; *Central Savings Bank* v. *Baltimore*, 71 Maryland, 515; *Dologny* v. *Smith*, 3 Louisiana, 418, 423; *District of Columbia* v. *Cemetery*, 5 App. D. C. 497; *Drainage District* v. *Campbell*, 154 Missouri, 151; *German Bank* v. *Stumpf*, 73 Missouri, 311, 314; *Harrison* v. *Newman*, 71 Kansas, 325; *Jenkins* v. *Pierce*, 98 Illinois, 646; *Johnson* v. *Dorsey*, 7 Gill, 269, 286; *Land Co.* v. *Loan Co.*, 52 Nebraska, 410; *Leffler* v. *Armstrong*, 4 Iowa, 487; Lewis on Eminent Domain, 579; *Baltimore* v. *Little Sisters*, 56 Maryland, 400; *McGilvery* v. *Lewiston*, 13 Idaho, 338; *Muskingum Turnpike* v. *Ward*, 13 Ohio, 120; Paige & Jones on Taxation, 763; *P., W. & B. R. R.* v. *Shipley*, 71 Maryland, 515; *Royal Ins. Co.* v. *South Park*, 175 Illinois, 491; *Stine* v. *Wilkson*, 10 Missouri, 75; *Washington* v.

*Bassett*, 15 R. I. 563; *Weld* v. *Rees*, 48 Illinois, 428; *White* v. *Malcolm*, 15 Maryland, 529.

*Mr. Joseph W. Cox* and *Mr. W. C. Sullivan*, with whom *Mr. J. J. Darlington*, *Mr. A. E. L. Leckie* and *Mr. John A. Kratz* were on the brief, for respondents:

Failure to consider dedications in making assessments of benefits as directed by statute requires the verdict of the jury to be set aside.

Injustice will result to the respondents if verdict is allowed to stand.

The provision of the Code which was disregarded in the making of assessments is mandatory, and such disregard necessitates the setting aside of the verdict.

Even if the provision were not mandatory, the plain error involved in disregarding it requires that the verdict be set aside.

The notice as published was not sufficient to authorize the making of assessments.

The burden of proof was upon the District to show the extent of benefits.

Numerous authorities sustain these contentions.

MR. JUSTICE HOLMES delivered the opinion of the court.

This was a proceeding by the petitioners for the extension and widening of Colorado Avenue and Kennedy Street in the District of Columbia, under a special act of June 30, 1911, c. 1, 37 Stat. 1. A jury was summoned, assessed the damages for the land to be condemned for the purpose, found that the lots described in a schedule would be benefited to the amounts set forth, and assessed those sums against them. The verdict was objected to and excepted to by the respondents, but was confirmed by the Supreme Court. On appeal the judgment was reversed by the Court of Appeals of the District. 40 App. D. C. 130.

The first ground of reversal was that the notice of the proceedings was insufficient, which, if true, will cast a cloud upon a great number of condemnations that have been made heretofore. The condemnation is a proceeding *in rem* under and in accordance with subchapter one, of chapter 15, of the District Code. By § 491c of that subchapter the court is to "cause public notice of not less than twenty days to be given of the institution of such proceeding, by advertisement in three daily newspapers published in the District of Columbia," etc. The order in this case directs publication "once in the Washington Law Reporter and on six secular days in the Washington Evening Star, the Washington Herald, and the Washington Post, . . . commencing at least twenty days before" January 9, 1912, the date fixed for appearance. The objection and the decision of the Court of Appeals was that the order did not follow the statute because the statute requires that notice shall be published in three daily papers for at least twenty days.

The respondents are concerned only as parties assessed for the betterment. As such they could not be mentioned by name in the notice since by the statute the jury decides what land is benefited as well as the sum with which it shall be charged. Section 491g. It is necessary, of course, that due precautions should be taken to see that they get notice in fact. This consideration together with the requirement that the publication shall be in a daily paper and its view of the meaning of the words led the Court of Appeals to the conclusion to which it came. Nevertheless we are of a different opinion. The statute means that notice shall be given either not less than twenty days before the time set or on twenty distinct days before that time. We think it means the former. As to the usage of speech, when we speak of giving a week's or a month's notice we mean a notice that is a week or a month before the event. The fact that the statute has been so construed

in a great number of cases in the District, a list of which has been submitted to us, is important not only as confirmation of our view but as a reason for taking it if we felt more doubt than we do. It seems to be the prevailing rule in the state courts although there are decisions on the other side. Publication in daily papers is explained sufficiently by their being the papers that business men are most likely to read. It was said that construed as we construe it the statute would be satisfied if a single publication were made a year before the day. The answer is that the court fixes the notice and will see that no injustice is done. It should be observed further that the statute itself is notice of everything except the time and place of the proceeding. It locates exactly upon the face of the earth the extensions to be made and gives their length and width. We are of opinion that the order of publication complied with the law.

The other questions brought before us by the certiorari are of no general importance and may be disposed of in a few words. They concern the conduct of the trial, matters that in the absence of very clear error we leave to the local courts. It was held to be error not to instruct the jury that the burden was upon the District to establish by a preponderance of evidence the extent of the special benefits accruing to the property to be charged. We may assume that the special act has adjudicated the extent of the benefits as a whole, *Briscoe* v. *District of Columbia*, 221 U. S. 547, 551, but it leaves open all questions as to any particular lot. Those elements of the petitioners' case remained for them to prove.

A matter more insisted upon by the Court of Appeals is that the jury were not instructed to take into consideration the dedication of land for the improvement and the value of the land so dedicated, as the Code requires that they should be. Section 491g. The court was satisfied from an examination of the record that the jury did not

consider valuable dedications made by the respondents. The argument is very strong that the court was right on the matter of fact, and as the jury were not instructed as to their duty we accept the conclusion of the Court of Appeals. We also agree with that court that the assessments for benefits cannot be separated and therefore that the error cannot be corrected by a reversal of the judgment in part. The result is that although the Court of Appeals erred upon the matter of most general importance its judgment reversing that of the Supreme Court must be affirmed.

*Judgment affirmed.*